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United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
CARL F. NOBLE,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Montana.

FILED

MAR 30 1935

PAUL F. DUBRIEN,
Clerk



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

Messrs. MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana,
Attorneys for Plaintiff and Appellee.
Mr. JAMES H. BALDWIN,
United States Attorney,
Mr. R. LEWIS BROWN,
Assistant United States Attorney, and
Mr. FRANCIS J. McGAN,
Attorney, Department of Justice,
all of Butte, Montana,
Attorneys for Defendant and Appellant. [1*]

In the District Court of the United States in and
for the District of Montana

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED, that on April 11th,
1932, the Complaint was duly filed herein, in the
words and figures following, to wit: [2]

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

[Title of Court and Cause.]

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That at all the times herein mentioned the plaintiff was and still is a citizen of the United States and a resident of the State of Montana.

II.

That on or about the 20th day of September, 1917, the plaintiff enlisted in the armed forces of the United States; that he served the defendant in the United States Army from said date down to and including the 30th day of July, 1919, when he was discharged from said Army, and that during all of the said time he was employed in the active service of the defendant during the war with Germany and its allies.

III.

That between said dates the plaintiff made application for insurance under the provision of Article Four of the War Risk Insurance Act of Congress, and the rules and regulations of the War Risk Insurance Bureau established by said Act, in the sum of Ten Thousand Dollars (\$10,000.00) and that thereafter there was duly issued to the plaintiff by said War Risk Insurance Bureau a certificate of his compliance with the War Risk Insurance Act, so as to entitle him, and his beneficiaries, to the benefits of said Act, and

the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, [3] and the Directors thereof, and that during the term of his service with the said War Department, in said Army as aforementioned, there was deducted from his pay for said services by the United States Government, through its proper officers, the monthly insurance premiums provided for by said Act and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the Directors thereof.

IV.

That during the period of his service in said War with Germany and its allies as above mentioned and while said insurance was in full force and effect the plaintiff contracted certain diseases and disabilities and suffered certain injuries, which said diseases, injuries and disabilities have continuously since the date of his discharge from the defendant's army, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases and disabilities and injuries are of such a nature and founded upon such conditions that it is reasonable to suppose and believe that it will continue throughout the lifetime of the plaintiff to so render the plaintiff unable to follow any substantially gainful occupation, and that the plaintiff has been ever since his discharge from the defendant's army and still is totally and permanently

disabled by reason of and as a direct and proximate result of such diseases, injuries and disabilities received and contracted while his War Risk Insurance was in full force and effect.

V.

That the plaintiff made application to the United States Government, through the Veterans Bureau, and the Director thereof, and the Bureau of War Risk Insurance, and the Veterans' Administration and the Director thereof, for the payment of said insurance, and for the monthly payments due under the provisions of said War Risk Insurance Act, for total permanent disability, and that the said Veterans' Bureau, and the said Bureau of War Risk Insurance, and Veterans' Administration and the Directors and Administrators thereof, have refused to pay the plaintiff the amount provided for by the War Risk Insurance Act, and have disputed [4] the claim of the plaintiff to the benefits of said War Risk Certificate, issued under the Act, and have refused to grant him said benefits and have disagreed with him concerning his rights to the insurance benefits of said Act.

VI.

That under the provisions of the War Risk Insurance Act and the other acts of Congress relating thereto the plaintiff is entitled to the payment of Fifty-Seven and 50/100ths Dollars (\$57.50) for each

and every month transpiring from and after the date of his discharge from the defendant's army and all such monthly installments accruing since the date of his discharge are now due and owing from the defendant to the plaintiff.

VII.

Plaintiff has employed the services of Mohunby, Busha & Greenan, Lawyers, duly licensed to practice their profession in the State of Montana to prosecute this action to a conclusion and that under the provisions of the War Risk Insurance Act, the court as a part of this judgment or decree may allow as a reasonable attorney's fee the sum of ten percent (10%) of the amount recovered under the contract of insurance and to be paid by the bureau out of the payment to be made under the judgment and in accordance with the law at a rate not to exceed one-tenth (1/10) of each of such payments until paid and that ten percent (10%) is a reasonable Attorneys' fee in the premises.

WHEREFORE, Plaintiff prays judgment as follows:

1. For the sum of Fifty-Seven and 50/100ths (\$57.50) Dollars per month for each and every month elapsing from and after the 30th day of July, 1919 until the date of judgment herein.

2. That the Court as a part of its judgment or decree direct that ten percent (10%) of the amount recovered out of the contract of insurance and to be paid by the bureau out of the payments to be made

under the judgment and in accordance with the law and at a rate not to exceed one-tenth (1/10) of [5] each of such payments be paid to the attorneys for the plaintiff as a reasonable attorneys' fee.

3. For such other and further relief as to the court may seem just.

MOLUMBY, BUSHA & GREENAN

Attorneys for Plaintiff.

State of Montana:

County of Cascade:—ss.

C. T. Busha, Jr., being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by this affiant is that the plaintiff does not now reside in the County of Cascade wherein this affiant resides and makes this verification.

C. T. BUSHA, Jr.

Subscribed and sworn to before me this 11th day of April, 1932.

[Seal]

C. F. HOLT

Notary Public for the State of Montana. Residing at Great Falls, Montana. My Commission expires Feb. 10, 1935.

[Endorsed]: Filed April 11, 1932. C. R. Garlow, Clerk. [6]

Thereafter, on April 11, 1932, Summons was duly issued herein, in the words and figures following, to wit: [7]

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America,
Greeting:

To the Above-named Defendant:

United States of America

You are Hereby Summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within sixty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Charles N. Pray, Judge of the United States District Court, District of Montana, this 11th day of April in the year of our Lord one thousand nine hundred and thirty-two and of our Independence the one hundred and fifty-sixth.

[Seal]

C. R. GARLOW,

Clerk.

By C. G. Kegel, Deputy Clerk. [8]

United States Marshal's Office
 District of Montana

I hereby Certify, that I received the within summons on the 4th day of Feb., 1933, and personally served the same on the 4th day of February, 1933, on United States of America by delivery to, and leaving with D. L. Egnew, Assistant U. S. Attorney personally, at Billings, County of Yellowstone in said District, a copy thereof, together with a copy of the Complaint, attached thereto.

Dated this 4th day of February, 1933.

ROLLA DUNCAN,

U. S. Marshal.

By E. B. Fellows, Deputy.

[Endorsed]: Filed February 7, 1933. [9]

Thereafter on May 13, 1933, Answer was duly filed herein in the words and figures following, to-wit: [10]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to plaintiff's complaint herein, admits, denies and alleges as follows: to-wit:

I.

Admits Paragraphs 1 and 2 of said complaint.

II.

Admits the allegations of Paragraph 3 of said complaint, but in that connection alleges that the

War Risk Insurance policy issued to plaintiff lapsed and was cancelled on October 1, 1919 for non-payment of the premium due thereon September 1, 1919.

III.

Denies Paragraphs 4, 5, 6 and 7 of said complaint.

IV.

Except as herein specifically admitted, qualified or denied, denies generally and specifically each and every and all of the allegations in said complaint contained.

V.

WHEREFORE, having fully answered, defendant prays judgment that plaintiff take nothing herein, and that plaintiff's complaint be dismissed and that defendant have its costs.

WELLINGTON D. RANKIN,
United States Attorney.
D. L. EGNEW,
Assistant United States Attorney
for the District of Montana.
D. D. EVANS,
Insurance Attorney.
Attorneys for the Defendant [11]

State of Montana,
County of Lewis & Clark—ss.

D. L. Egnew, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the District

of Montana, and as such makes this verification to the foregoing answer; that he has read the answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. L. EGNEW.

Subscribed and sworn to before me this 11 day of May, 1933.

[Seal]

C. R. GARLOW,
Clerk.

[Endorsed]: Filed May 13, 1933. [12]

Thereafter, on November 1st, 1934, the Verdict of the jury was duly rendered and filed herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th day of July, 1919, the date of his discharge.

G. H. PACKARD,
Foreman.

[Endorsed]: Filed Nov. 1, 1934. [13]

Thereafter on November 1, 1934, Judgment was filed and entered herein in the words and figures following, to-wit: [14]

In the District Court of the United States in and for the District of Montana, Great Falls, Division.

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

THIS CAUSE came on regularly to be tried on the 29th day of October, 1934, Molumby, Busha & Greenan appearing as counsel for the plaintiff, James H. Baldwin, United States Attorney, Louis Brown, Assistant United States Attorney and Francis McGan, Attorney, Department of Justice, appearing as counsel for the defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause; witnesses on the part of the plaintiff and the defendant were sworn and examined; after hearing the evidence, arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict, and returned into Court their verdict in words and figures as follows:

“WE, THE JURY, in the above entitled cause, find for the plaintiff and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th of July, 1919, the date of his discharge.

G. H. PACKARD, Foreman.”

and the Court being advised in the premises, it hereby specifically finds that the plaintiff has employed Molunby, Busha & Greenan, duly licensed and practicing attorneys, licensed to practice their profession before this Court, the Courts of the State of Montana, and before the United States Supreme Court, [15] to prosecute this action, and finds as a reasonable attorney fee ten percent (10%) of the amount recovered under the contract of insurance to be paid by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law, at a rate not to exceed one-tenth of each of such payments until paid.

WHEREFORE, by virtue of the law, and by reason of the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover of and from the defendant, the United States of America, Fifty-seven and 50/100 Dollars (\$57.50) for each and every month elapsing from and after the 30th day of July, 1919, the date on which said plaintiff was discharged from the United States Army, and prior to which date the jury found the plaintiff to be permanently and totally disabled, and up to and in-

cluding the date hereof, and for the further sum of Fifty-seven and 50/100 Dollars (\$57.50) per month from and after the date hereof so long as the plaintiff shall remain permanently and totally disabled, and the Court as a part of its judgment, determines and allows as a reasonable attorney fee for the attorneys of the plaintiff, ten percent (10%) of the amount recovered under the contract of insurance and to be paid by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law at a rate not to exceed one-tenth of each of such payments until paid.

Dated: November 1st, 1934.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and Entered Nov. 1, 1934. [16]

Thereafter, on November 1, 1934,

DEFENDANT'S REQUESTED INSTRUCTIONS NOT GIVEN BY THE COURT,

was duly filed herein, in the words and figures following, to-wit: [17]

1. You are instructed to find your verdict for the defendant in this case.

Not given.

C. N. Pray, Judge. [18]

INSTRUCTION NO. 7

You are instructed that vocational training was given to veterans disabled in the service during the World War only after a determination that such veteran was unable to follow the occupation or occupations which he had followed prior to the World War.

Not given.

C. N. Pray, Judge. [19]

9. The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence that he was totally and permanently disabled while the policy was in force,—that is on or after September 20, 1917, and prior to July 30, 1919, and could not thereafter continuously follow any gainful occupation. It is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally and permanently disabled on or between September 20, 1917, and July 30, 1919, your verdict must be for the defendant for these two elements, total disability and permanent disability must concur before plaintiff has a right to recover in this action.

Not given.

C. N. Pray, Judge. [20]

10. In determining whether plaintiff was totally and permanently disabled prior to July 30, 1919, the test is whether he, at that time had a disability

which rendered it impossible for him to follow continuously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be for the defendant.

Not given.

C. N. Pray, Judge. [21]

15. Whenever a party has by his own declaration, act or omission intentionally and deliberately led another to believe a particular thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for his discharge from the United States Army he was asked the following question and gave the following answer in writing, to-wit:

“Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health,

whether or not incurred in military service?

“A. Yes.

“Q. If so describe the disability stating the nature and kind of wound, injury or disease.

“A. Hearing.

“Q. When was the disability incurred?

“A. Couple months ago.

“Q. Where was the disability incurred?

“A. France.

“Q. State the circumstances, if known, under which the disability was incurred.

“A. Unknown.”,

and by such declarations and acts, intentionally and deliberately led the defendant and its officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in the military service, except as stated therein, and thus secured his discharge from said army, he cannot now be permitted to falsify said statement. (Sub-division 3, Section 10, 605, R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [22]

19. Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore, if a weaker and less satisfactory evidence is offered,

when it appears that stronger and more satisfactory was within the power of the party, the evidence should be viewed with distrust. (Sub-division 6 and 7, Section 10, 672, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [23]

14. The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant.

Not given.

C. N. Pray, Judge. [24]

20. A wife cannot be examined against her husband without his consent; nor can a wife, during the marriage or afterwards, be, without the consent of her husband, examined as to any communication made by him to her during the marriage. (Sub-division 1, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [25]

21. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a

civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. (Sub-division 4, Section 10, 536 R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge. [26]

22. You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. (Section 10, 605, R. C. M., 1921; Section 631, Title 28, U. S. C.)

Not given.

C. N. Pray, Judge.

[Endorsed]: Filed Nov. 1, 1934. [27]

Thereafter, on November 1, 1934, Stipulation granting Defendant time for Bill of Exceptions was duly filed herein, in the words and figures following, to-wit: [28]

[Title of Court and Cause.]

DEFENDANT'S STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, acting through their respective counsel of record, that the defend-

ant may have and is hereby granted ninety days from this date in which to prepare, serve and file a bill of exceptions herein;

IT IS FURTHER STIPULATED AND AGREED that an order may be made by the Judge of the above entitled court giving and granting to the defendant ninety days from this date in which to prepare, serve and file a bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934.

MOLUMBY, BUSH & GREENAN

Attorneys for the Plaintiff.

JAMES H. BALDWIN

United States Attorney for the
District of Montana.

R. LEWIS BROWN

Assistant U. S. Attorney.

FRANCIS J. MCGAN

Attorney, Department of Justice
Attorneys for the Defendant.

[Endorsed]: Filed Nov. 1, 1934. [29]

Thereafter, on November 2, 1934, Order Granting Defendant Time for Bill of Exceptions was duly filed herein, in the words and figures following, to-wit: [30]

[Title of Court and Cause.]

ORDER.

Pursuant to the stipulation of the parties hereto, it is ordered and this does order that the defendant above named may have and is hereby granted ninety days from and after the 1st day of November, 1934 in which to prepare, serve and file its bill of exceptions in the above entitled cause.

Dated this 2nd day of November, 1934.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Nov. 2, 1934. [31]

Thereafter, on November 17, 1934, Order extending term was duly filed herein, in the words and figures following, to-wit: [32]

[Title of Court and Cause.]

ORDER.

IT IS HEREBY ORDERED, and this does order, that the term at which the trial of the above-entitled action was had be, and it is, hereby extended to and including the day on which defendant's bill of exceptions is finally settled.

Dated this 17th day of November, 1934.

CHARLES N. PRAY, Judge.

[Endorsed]: Filed Nov. 17, 1934. [33]

Thereafter, on February 12th, 1935, the Bill of Exceptions herein was duly signed, settled and allowed, being in the words and figures following, to wit: [78]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED That this cause was regularly set for trial and came on for trial on Monday, October 29, 1934, in the Court Room of the Court House at Great Falls, Montana, at ten o'clock A. M. of said day before the Honorable C. N. Pray, Judge Presiding sitting with a Jury of twelve, regularly empanelled.

Upon said cause being called for trial, Messrs. Molumby, Busha & Greenan appeared as Counsel for Plaintiff, and J. H. Baldwin, United States District Attorney, R. Lewis Brown, Assistant District Attorney, and F. J. McGan, Attorney for Department of Justice, appeared as Counsel for the Defendant.

All parties announced themselves ready for trial, and thereupon the following proceedings were had and the following evidence [82] introduced, and none other, to-wit.

Whereupon Mr. Busha made the opening statement to the jury.

PLAINTIFF'S CASE.

Mr. MOLUMBY: I would like to call Dr. Porter out of order, so that he may go back to Lewistown.

The COURT: Very well.

Whereupon

E. S. PORTER,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

Q. You may state your name, please?

A. E. S. Porter.

Mr. BALDWIN: At this time, the Defendant objects to the introduction of any testimony in this case upon the grounds and for the reasons following, that the court is without jurisdiction of the person of the defendant.

(2) That the court is without jurisdiction of the subject of the action.

(3) That the defendant cannot without its consent be sued, and it has not consented to be sued in this action.

(4) That the complaint fails to state a cause of action.

(5) That it is not shown by the complaint in this case that the plaintiff has brought himself within the provisions of the statute authorizing the bringing of an action against the defendant in this case. That it appears from the complaint in the case that there has been no denial of any claim made by the plaintiff by the administrator of the veterans administration, and finally that it does not appear on the face of the pleadings in this case that the action was brought within the time within which an action of this kind might be brought.

(Testimony of E. S. Porter.)

The COURT: I will overrule the objection. [83]

Mr. BALDWIN: I will ask an exception.

My name is E. S. Porter. I reside in Lewistown, Montana. My profession is that of a physician and surgeon. I have practiced that profession for twenty-four years. I practiced my profession during those years at the St. Luke Hospital, Denver; Kansas City Hospital, Kansas City, Missouri; United States Army.

Mr. MOLUMBY: May the records show that Counsel for the government admits the qualifications of the Doctor.

Mr. BROWN: That is correct.

WITNESS continues: I was in the army during the war.

Q. Were you a member of the medical corps of the United States Army during that time?

A. Yes.

Mr. BALDWIN: We object to this line of examination as immaterial unless he had some contact with the plaintiff in this case during that period.

The COURT: It is simply an additional qualification.

Mr. MOLUMBY: That is all.

Q. Where were you stationed while in the army?

A. At Fort Riley Hospital, for the ruptured and crippled in New York City; Camp Joseph B. Johnson, Florida; U. S. General Hospital 49, Fort Snelling. I am acquainted with Carl Noble. I have examined him in my professional capacity. I can give

(Testimony of E. S. Porter.)

you the date on which I examined him, it was February 19, 1923.

Q. Will you state to the jury what you found upon your examination of him?

Mr. BALDWIN: I object to this as incompetent, irrelevant and immaterial; too remote.

The COURT: Well, I suppose he has not been able,—at least, he has [84] said he wanted to take the Doctor out of order. I presume he will connect it up with the proof in some way.

Mr. BALDWIN: We merely want to save the record in the event he does not.

The COURT: I will overrule the objection with that understanding.

Mr. BALDWIN: Note an exception.

Q. Will you now, Doctor, answer the question if you recall. The question was: Will you state to the jury what you found upon your examination of him?

A. He was suffering from heart trouble. I will recount more in detail the way it manifested itself. He came in suffering with pain in the left chest; shortness of breath, palpitation, weakness, fatigue, inability to carry on his occupation. I gave him a complete medical examination at that time. As to what it disclosed with reference to his heart trouble, his heart at that time was incompetent, that is, he was unable, in my opinion at that time to carry on.

Mr. BALDWIN: We move to strike the answer as not being responsive.

The COURT: Yes, it is not responsive.

(Testimony of E. S. Porter.)

Q. What do you mean by incompetent, with reference to his heart?

A. The heart was unable to respond to ordinary exertion in the normal manner. That is, ordinary exertion would bring on this pain and shortness of breath and palpitation, weakness. I think I diagnosed his case at that time as valvular heart disease. As to what, if anything, I noticed at that time with reference to his nervous condition, I will say that he was very apprehensive. I will explain to the jury what I mean, he was afraid he was going to die. As to what if anything, that indicates with reference to his nervous condition, it indicated to my mind that he was extremely nervous. As to whether I noted anything else with reference to [85] his nervous condition at that time, he had a coarse tremor in his hands at that time.

Q. Did he give you any history at that time of the case, as you recall?

A. As I recall he said that he had——

Mr. BALDWIN: I object to that as not responsive, I think that calls for a yes or no answer.

The COURT: Sustain the objection.

Q. Will you answer that question yes or no, Doctor?

A. Yes sir.

Q. State what history he gave you upon his case at that time?

Mr. BALDWIN: We object to that as hearsay, and too remote, and not a statement that was made

(Testimony of E. S. Porter.)

by the patient for the purpose of treatment by the Doctor, but for examination purposes only.

Mr. MOLUMBY: I will withdraw the question at this time. Doctor, did he come in to you for treatment at that time, or for what purpose?

A. He came in for treatment.

Q. Now, I will ask you what the history of the case was that he gave you at that time?

Mr. BROWN: We object to it as hearsay and too remote.

The COURT: Overrule the objection.

A. He gave a history of mumps, followed by involvement of the testicles. I believe he said he had been gassed, and before his discharge in 1919 that he had influenza. As to what treatment or advice I gave him with reference to treatment at that time I will say that I gave him no treatment; I advised him to go to Fort Harrison. Fort Harrison is a United States Veterans Hospital at Fort Harrison. That is a Hospital that the Government maintains for the care of disabled soldiers. The condition that [86] I found upon my examination was of such a nature as to be permanent, in the sense that it was reasonable at that time to suppose that it would exist throughout the rest of his life.

Q. Was the condition that you found at that time totally disabling in the sense that it would prevent him from following a substantially gainful occupation, defining the term "Total" as not meaning complete helplessness, or a disability that

(Testimony of E. S. Porter.)

would prevent him from working at times, it not being total if he was able to work continuously and regularly, but if he was able to work only spasmodically it still might be total, but if his disability was of such a nature as to prevent his working with a reasonable degree of regularity, but if the condition was of such a nature as to make work injurious to his health, or would endanger his health or life, then it would still be total. Having that definition and explanation of the term total in mind, state whether or not he was totally disabled at that time.

A. Yes.

Cross Examination by Mr. Brown:

I say that he came into my office for treatment. As to how often I treated him, I will say that I did not treat him. I did not know Noble prior to the time in February that he came into my office. I had not been acquainted with him at all; I did not know him. I stated that when he came in he was suffering pain in the left chest. As to whether I based my statement as to that on what he told me, I will say on the subjective symptoms, yes. I stated that I found that he was extremely nervous because he was afraid he was going to die. He told me that. As to whether I based my opinion as to his nervous condition upon the statements that he made to me, I will say, no, I based his apprehension upon what he told me. I did not base my conclusion as to his [87] nervous condition upon his apprehension.

(Testimony of E. S. Porter.)

At that time I did make tests of the reflexes. I made tests of the tremors and tests as to the extension of the fingers.

A. Extension of the fingers?

Q. Yes.

Q. What do you mean?

A. By the patient, having him hold his hand.

A. That is the test for tremor. I stated I found he was suffering from heart trouble at that time. I never saw him after that one examination.

Q. At that time you gave your prognosis as unfavorable, isn't that true?

A. Never saw him professionally.

Q. That is what I mean. You never saw him professionally?

A. No sir.

Q. You have described, Doctor, in your direct examination all you found wrong with Noble?

A. I answered all the questions correctly, yes.

Redirect Examination by Mr. Molumby:

Q. I don't know whether you answered Counsel's preceding question. He asked you if you had made the prognosis at that time, that his prognosis was unfavorable?

A. I did.

Q. What did you mean by that?

A. That was my opinion that he would continue to progressively get worse.

Q. Do you think of anything else that you discovered in his condition now, that you did not mention previously?

(Testimony of E. S. Porter.)

A. No, I don't think so.

Recross Examination by Mr. Brown: [88]

I mean by prognosis "Unfavorable". That his condition would continue to get worse. That was the opinion that I had after this examination that I made of him in February, 1923.

Witness Excused.

Mr. MOLUMBY: If the court please, I might state to the court at this time that a deposition was taken of the Plaintiff in the Hospital at Helena some time ago, I have forgotten, it was about a year ago according to my memory. The deposition was supposed to be forwarded to the Clerk. I would like to inquire of the Clerk if he has the deposition of Carl Noble, forwarded to him by the Notary Public taking the deposition.

The CLERK: Yes, we have.

Mr. MOLUMBY: May it now, by order of the court, be opened in open court.

The COURT: Very well. Are you going to show that the plaintiff will not be able to be present?

Mr. MOLUMBY: Yes.

Mr. BALDWIN: We shall object to any examination concerning why he is not able to be here. We admit that he is not able to be here.

The COURT: Very well, the deposition then may be opened.

Mr. MOLUMBY: The following is the deposition taken of Carl F. Noble and reads as follows:

Mr. BROWN: The stipulation is not part of the deposition and we object to its being read.

Mr. MOLUMBY: I will not read it.

The COURT: Very well.

Whereupon the

DEPOSITION OF CARL F. NOBLE

was read to the jury, and is in words and figures as follows to-wit: [89]

[Title of Court and Cause.]

DEPOSITION.

BE IT REMEMBERED that pursuant to a Stipulation hereto attached on the 2nd day of June, 1933 at Fort Harrison, Lewis and Clark County, State of Montana, before me, Arthur K. Serumgard, Notary Public in and for the State of Montana, County of Lewis and Clark, duly appointed to administer oaths, personally appeared Carl F. Noble, a witness produced on behalf of the Plaintiff in the above entitled action now pending in said Court, who, being by me first duly sworn, was then and there examined and interrogated by Loy J. Molumby, Attorney for the Plaintiff, and D. D. Evans, Chief Attorney, Veterans Administration, representing the Defendant, and the following proceedings were had:

(Deposition of Carl F. Noble.)

Direct Examination by Loy J. Molumby:

Q. Your name is Carl F. Noble, is it not?

A. Yes.

Q. How old are you?

A. I am 45.

Q. Where is your home?

A. Grass Range, Montana.

Q. That is in Fergus County?

A. Yes.

Q. Did you serve in the World War in the United States Army?

A. Yes, I did.

Q. I will show you what I have marked for purposes of identification Plaintiff's Exhibit No. 1, and ask you what that is?

A. That is my discharge from the army.

Q. It was given to you when you were discharged from the army, [90] was it?

A. Yes.

Q. We will offer Plaintiff's Exhibit No. 1, being the discharge of the Plaintiff from the United States Army, as a portion of the deposition.

Mr. EVANS: There is no objection, and it may be stipulated that the discharge may be copied and the original, which is apparently authentic, returned to Mr. Noble by the Notary Public.

Q. You were discharged, were you not, at Fort D. A. Russel, Wyoming, as shown by Exhibit No. 1?

A. Yes.

(Deposition of Carl F. Noble.)

Q. Do you recall, Mr. Noble, demanding of the United States Government the benefits of your war risk insurance policy?

A. Yes, I remember asking for it.

Q. How did you do that? By letter?

A. Yes.

Q. Do you recall the date of it?

A. I believe it was January 22, 1931.

Q. I will ask the Attorney for the Defendant if he has such a letter as a portion of the war risk insurance file of the Plaintiff, to produce the same.

(Attorney for Defendant produces letter of January 22, 1931)

Q. This letter produced, bearing date of January 22, 1931, was that signed by yourself?

A. Yes.

Q. I will offer Plaintiff's Exhibit No. 2 in evidence as a portion of the deposition of Carl F. Noble, and ask that it be attached to said deposition as Plaintiff's Exhibit No. 2.

Mr. EVANS: To which offer there is no objection, and it is further stipulated that the Exhibit No. 2 is in the handwriting and acknowledged to be signed by the Plaintiff, and that it may be withdrawn and a copy made by the Notary Public and the original returned to the files of the Defendant.

Mr. MOLUMBY: To which stipulation I agree.

[91]

Mr. BALDWIN: We object to the reading of that Exhibit on the ground and for the reason that it purports to be a writing signed by one acting

(Deposition of Carl F. Noble.)

without authority, a Director of the Veterans Bureau, not by the Administrator of the Veterans Bureau. We object to it as incompetent, irrelevant, and immaterial.

Mr. MOLUMBY: It is not now too late to raise that objection on the ground that Mr. Evans said he had no objection.

Mr. BALDWIN: We have a right to save the objection.

The COURT: I will overrule the objection.

Mr. BALDWIN: Exception noted.

Q. Carl, when you first enlisted, where, if any place, were you sent for training?

A. When I first enlisted I was sent to Spokane, Washington.

Q. From there where were you sent?

A. To Gettysburg, Pennsylvania.

Q. What is the camp at Gettysburg?

A. Camp Gettysburg, I believe.

Q. From that camp where were you sent?

A. To Camp Green, Charlotte, North Carolina.

Q. Is that a point of embarkation?

A. No, that is a large training camp.

Q. From that camp where were you sent?

A. To Camp Merritt, New Jersey.

Q. Did you subsequently go overseas?

A. Yes.

Q. From Camp Merritt?

A. From Camp Merritt by way of Hoboken.

(Deposition of Carl F. Noble.)

Q. While in the camps in this country did you have any physical trouble?

A. Yes.

Q. Just state what and where they occurred?

A. The first I recall I was on the train going from Gettysburg to Camp Green.

Q. What was the nature of that sickness? [92]

A. I was nauseated, vomitted, had diarrhea, and was dizzy, and after we got to camp we slept in the pup tents the first night and I vomitted all night. I had to go to the latrine several times. The next morning I went on sick report. Then I went to the infirmary, was examined and marked "duty".

Q. Did you then do duty?

A. Yes. That forenoon I went and laid down on my bunk and that afternoon on formation drill I came near fainting and went and sat down, and one of the drill sergeants told me to get back into line or he would wind a rifle around my neck, and I told him to start winding. The first sergeant came around and wanted to know what the trouble was. I started to explain to him and he looked at me and said: "Sergeant, that man is sick", and he detailed Corporal Hamilton and a private to take we over to the infirmary. I was taken over to the infirmary, given an examination, sent back to the company, and marked "duty".

Q. Were you then compelled to do duty?

A. Not that afternoon.

Q. How soon thereafter?

(Deposition of Carl F. Noble.)

A. I was sick the next morning, but I was marked "duty" and tried to do duty. In a few days I was alright. I made two or three more trips over there.

Q. The first night during your sickness did you have any assistance from any of the men?

A. Nothing more than for Corporal Collins getting me some water, something like that.

Q. Who was Corporal Collins?

A. He was the Corporal of the squad I was in.

Q. Did he give you any directions about staying in your bed?

A. He told me to lay down and stay there and keep quiet. [93]

Q. Mr. Noble, after going back on duty, how long did you remain sick while on duty?

A. It must have been three or four days when I was sick.

Q. During that time did you attempt to do the full duty of drilling?

A. No, I couldn't do the full duty.

Q. At the end of these three or four days were you back in such shape as to be able to do duty?

A. Yes.

Q. Subsequently, Carl, did you again have any sickness while at Camp Green?

A. Yes.

Q. What was the nature of that sickness?

A. I had the mumps.

(Deposition of Carl F. Noble.)

Q. Just describe your condition while you had the mumps.

A. There had been considerable amount of mumps around the camp and one morning I felt a swelling to my jaws, and my jaws started to lock at times, and I went over to the infirmary on sick report one morning and when it came my turn to stand up before the doctor he asked what my trouble was and I told him I had the mumps, and he asked me who told me that I had the mumps and I told him it wasn't nobody, I just knew I had them. He said I didn't know any such damn thing.

Q. What if anything, did he do?

A. I was marked "duty" and sent back to the camp.

Q. Did you, while you had the mumps, attempt to do duty?

A. No, not then. I went over to the infirmary that afternoon again. There was two doctors examined me in the afternoon.

Q. Different doctors than the one in the morning?

A. The first doctor that examined me in the morning and another.

Q. What did they do?

A. They decided there was nothing wrong with me, and the next morning I went over again. That morning they was getting rather impatient and the first doctor told the sergeant there to give [94] me about two-third of a glass of castor oil. He said that

(Deposition of Carl F. Noble.)

was good medicine for me and gave me castor oil and marked me "duty".

Q. Did you then report?

A. I went back to the camp and told the first sergeant what they told me, and he told me they couldn't have me hanging around the camp street all the time and to go down to the stable sergeants tent and hide out. I was lying around on the stable sergeants bunk and he come in and says: "Noble, there has been a couple of medical men through here and these ditches around the corral are not sanitary and they have to be drained immediately." He said, "There is no non-commissioned officer around here except you and I wish you would go out and kind of take charge of having them ditches cleaned out". There was about 25 or 30 wagoners and privates working there and these doctors or medical men came back to see how the work was progressing. I was leaning on a shovel and Major Williams called out: "Say, you, over there. Are you afraid you will bust the shovel?" I told him I wasn't afraid of it. He then told me to get to work and I told him that I was sick. He said, "Young man, you are the luckiest soldier in the army. It is our business to look after the sick people." He says: "What is your trouble?" I told him I had the mumps. The other doctor with him was the one I had been going over to see. He spoke to him in an undertone. They came up and looked me over a little and they says: "A little touch of quinzzy." They says: "You are

(Deposition of Carl F. Noble.)

not too sick to work. Get to using that shovel." I replied: "I am the non-commissioned officer in charge of this detail." He then asked me where my chevrons were. I told him I had never been issued any and he said: "Do you mean to say you are a non-commissioned officer"? I said, "Yes, sir". He said: "Then you are not supposed to do any work, but the next time we'll see you [95] with them chevrons on." The next morning the mumps were down on me. I went over to the infirmary and the doctor says: "What is it this time," or something like that. I told him I had been over four or five days complaining about the mumps and told him this time I had the proof that I had them. He examined me and asked me if I had been injured. I told him I hadn't. "You have had the mumps, but you are over with them now," and marked me "Duty." When I was in that condition I had to carry my entire equipment about two miles.

Q. Was that on march?

A. When we went to take the train to Camp Merrit, to entrain.

Q. Carl, you used the expression, the mumps "had gone down" on you. Had you at that time a swelling in the groin?

A. Yes.

Q. And soreness in the groin?

A. Yes.

Q. Was your jaw still swollen?

A. I believe it went down that morning or during the night.

(Deposition of Carl F. Noble.)

Q. Your pack and equipment you had to carry while on the two-mile march to entrain for Camp Merrit, just describe the weight of the pack and equipment you had to carry.

A. I have been told a soldier's marching equipment amounts to 73 pounds. Whatever the full equipment weighs I had.

Q. Did you then entrain for Camp Merrit.

A. Yes, we got on the train for Camp Merrit.

Q. When you got to Camp Merrit what condition were you in?

A. I was in about the same condition. The berth was made up for me at Camp Green and I laid down on my back all the way from Camp Green to Camp Merrit. We were on the train two days.

Q. After you arrived at Camp Merrit what, if anything, was done with you about your physical condition?

A. I went over to the barracks and went to bed, and the next [96] day there was some inspection officer come in there and they called us to attention and I didn't get on my feet very quick and they bawled me out for not coming to attention the way I should. I explained to them my condition and showed them my condition and I was taken before a doctor and I believe I was marked "Quarters".

Q. Did you remain in your quarters there for some days ?

A. Yes. We were also under quarantine on account of some disease at the same time in the barracks.

(Deposition of Carl F. Noble.)

Q. How long did you remain in bed?

A. Perhaps two days.

Q. Then you were able to get up and be around?

A. Yes. I got up and got around. I didn't have nothing to do. We were under quarantine.

Q. For how long a period?

A. I couldn't say exactly. It was until we were ready to leave for France and the quarantine was lifted.

Q. After quarantine was lifted, did you then shortly after go overseas?

A. Yes. We went to Hoboken and boarded the ship.

Q. When was that?

A. That was about the 16th of April, 1918.

Q. On your way overseas did you get so that you were completely recovered from the attack of the mumps?

A. I never got completely recovered I don't believe, but I got around pretty good.

Q. After getting overseas did you again have a period of sickness?

A. I was seasick on the ship.

Q. Before going overseas did you ever apply for war risk insurance?

A. Yes.

Q. For what amount?

A. For \$10,000.00. [97]

Q. Who did you name as beneficiary of the insurance?

(Deposition of Carl F. Noble.)

A. My brother, Purdy Noble, for \$5,000.00, and my sister Lily Noble, \$5,000.00.

Q. Have you ever exchanged the beneficiary of that insurance?

A. No, but I would like to.

Q. Where was this that you applied for the insurance?

A. At Camp Green, February 1, 1918.

Q. From that date on were the premiums on your insurance deducted from your pay?

A. They were.

Q. And up to and including the month of what?

A. Until after my discharge, including the month of August, 1919.

Q. Carl, when you got overseas, what outfit were you in?

A. In the supply company, 60th infantry.

Q. What division?

A. 5th Division.

Q. Was the 5th Division a regular army division or a national guard or draft outfit?

A. Regular army.

Q. Did you participate in all the engagements with the 60th Infantry from that time on until after the Armistice?

A. I did.

Q. In what engagements, if any, was it that you first became ill?

A. I was in the St. Mihiel.

Q. What occurred at that time?

(Deposition of Carl F. Noble.)

A. I was gassed at that time. That was in September, about the 14th I believe, when I was gassed.

Q. What type of gas did you encounter.

A. I couldn't tell. There are so many kinds of gas. I don't know much about this gas. I know that I was very near exhausted. I had been out for about 48 hours and they had a special gas guard for me to see that I had my mask on when gas showed up because I was so dead for sleep I didn't pay attention to the gas [98] and it was his business to reach out and feel that I had the respirator on properly. He had his feet on my ribs all night long it seemed to me. The next day I was vomiting, was sick and had diarrhea.

Q. How long were you sick from this gassing?

A. I was sick and sore in the chest for a week, maybe ten days.

Q. Did you thereafter encounter any other gas?

A. Yes.

Q. Where was that?

A. In the Argonne.

Q. Was that the same type of gas you ran into before?

A. I couldn't say. There was various types of gas, and I was gassed several times. Some of it seemed like pepper, and other seemed to cut a person's throat deep in the chest. I was in charge of this wagon train and had to get the animals out of the gas area. I couldn't put on my mask because I couldn't see with the mask on. I had to go with the

(Deposition of Carl F. Noble.)

mask off. I vomitted frequently for several days and had diarrhea even after the Armistice.

Q. How long before the Armistice was it that you encountered this gas?

A. About the middle of October. The first we encountered in the Argonne and we were gassed off and on until the Armistice. We went in there in October 6 or 11th, something like that and never was relieved. We were in the fighting area all the time.

Q. Subsequent to the Armistice, Carl, did your outfit go up as a part of the army of occupation into Germany?

A. It did.

Q. What part of Germany did you go into?

A. We was in Luxemburg.

Q. While at Luxemburg did you have another period of sickness?

A. Yes.

Q. What was the nature of that sickness? [99]

A. I believe it was the flu.

Q. Just describe what occurred.

A. I had headache, chills, was nauseated, and I was sick for several days. Captain Wilson came down to the corral and asked what had happened to me. I told him I was sick, and he asked me if I had been to the infirmary. I told him that I hadn't, and he told me to go to the infirmary. The next morning he asked me what they said. I told him I hadn't been there, and he told me again to go, and

(Deposition of Carl F. Noble.)

come back to find out if I had been sent to the hospital or what my condition was, and when he seen me he asked me what they said. I told him I hadn't been over and he told me that he was ordering me to go this time and if I didn't go, he would prefer court martial charges against me for disobeying orders. I went up to the supply company and was taken down to the infirmary and my name was put on sick call and I believe I was given some pills, although my temperature was not taken. I was marked "duty". The Captain come down to the corral after dinner and seemed rather surprised to see me and wanted to know if I had been to the infirmary. I told him I had and what they told me, and he cursed the medical officers down there terrible, and put me to bed. He detailed a wagoner and Palmeteer to look after my duties and I believe Wagoner Willinburg to see that I got rations, something to eat, that I was sick.

Q. How long were you laid up?

A. I was laid up four or five days, I expect, in bed.

Q. When was this? What month?

A. I believe it was in December. It might possibly have been January. It was in December, 1918 or January, 1919. We was in the City of Esch at Luxemburg at that time.

Q. After you got back up on your feet, were you well? [100]

A. No, I was weak and seemed a long time getting my strength.

(Deposition of Carl F. Noble.)

Q. When did you come back from overseas?

A. On July 13, 1919.

Q. Until you left for overseas had you recovered sufficiently so that you could go out and do regular duties of a soldier?

A. Not the duties I had done before. I was short of breath and got fatigued quicker than I did.

Q. When you came back on the boat were you in that same condition?

A. I was.

Q. What was your condition after you got back to this country the few days remaining between the time you arrived in this country and the time of your discharge?

A. About the same.

Q. Just state generally what your condition was and describe it during that period after you arrived in this country.

A. I was rather nervous, soft, couldn't stand much exertion. In fact I hadn't been doing a great deal of exertion.

Q. What about the continuance of your dizzy spells?

A. I wasn't bothered.

Q. When you exerted yourself during that period, what effect, if any, did it have upon your ability to breathe?

A. I was short of breath and the veins in my neck would throb and my ears would throb and I would have palpitation.

(Deposition of Carl F. Noble.)

Q. How about your weight during this period. How did it compare with your weight when you first went into the army?

A. Very little difference.

Q. You were about the same when discharged as when you first went in?

A. As near as I can remember.

Q. What was your normal weight during those days?

A. Around 150 pounds. [101]

Q. How tall are you?

A. 5 feet, 6 and $\frac{3}{4}$ I believe.

Q. How old were you when you enlisted?

A. 29 years and 5 months.

Q. Where were you discharged? What camp?

A. At Fort D. A. Russell, Wyoming.

Q. When you came out for discharge, what, if any, medical examination did they make?

A. We was lined up and walked past the doctors. I believe they put these here listeners on us two or three places and then they took up the next man.

Q. Did they give you any through physical examination?

A. No.

Q. Did they ask any questions about whether you were sick?

A. I don't believe they did as to a person being sick.

Q. Did you tell them at all you were sick?

A. I didn't.

(Deposition of Carl F. Noble.)

Q. Why not?

A. I wanted to get out.

Q. After discharge where did you first go?

A. I went home.

Q. To Grass Range?

A. To Grass Range, Montana.

Q. When you got home what was your physical condition?

A. I was very nervous and I was more short of breath than I had been when I first got back. I quit drinking coffee, and quit cigarettes, thinking perhaps that was giving me some heart trouble.

Q. Prior to going into the army what was your occupation?

A. I was a farmer.

Q. After you came back from the army were you able to go ahead and do the farm work?

A. Not the work I had done before I went into the army.

Q. Were you able to get out and plow?

A. Yes. That was where I first noticed one of my serious troubles. That fall I was plowing and would find myself rigid and stiff [102] on the plow. I would relax and before I would go thirty rods I would be the same condition, just as tight as a fiddle string.

Q. When you first got back from the army were you able to do all the work on the farm that spring in putting in your crop?

A. No. I had to have help.

(Deposition of Carl F. Noble.)

Q. Who helped you put in the crops that spring?

A. My brother.

Q. How big a crop did you put in?

A. We put in the usual crop that we had been putting in. I don't remember how big, close to 300 acres. Some of that had already been put in the fall before. It was fall wheat. He had a good deal of the ground ready when I came home from the war.

Q. What work were you able to do that spring, if any?

A. I done plowing and seeding, but no manual work. He done the heavy work.

Q. Were you able to do the heavy work?

A. I was sick that spring and I didn't get started until two weeks after he was working.

Q. How often would your work be interrupted by sickness that spring?

A. It wasn't interrupted much after I got started. I had these here pains in my chest and dizzy spells, palpitation, and was weak, and I started to work and quit and rested up again and went at it and after about two weeks I went ahead and we finished putting in the crop.

Q. That was in the spring of 1920?

A. Yes.

Q. You got back in July, 1919?

A. Yes.

Q. The crop was all in when you got back? [103]

A. He was harvesting it and a good deal of the ground was already prepared for winter wheat.

(Deposition of Carl F. Noble.)

Q. Were you able to do the harvesting that summer?

A. It was about finished. I might have had a little to do. There was not much harvesting to do that year.

Q. Did you do any work that fall?

A. Yes I done some work that fall.

Q. Is that the work you described as plowing?

A. Yes, when I noticed I would be tense and couldn't relax.

Q. Would the period when you would be able to work that fall in plowing be interrupted by sickness?

A. It would be interrupted by sleepless nights. My heart would get to palpitating and the bed would shake, and when I wouldn't work I wasn't troubled much.

Q. Just describe your condition after you had been working a day during that time how you would be at night.

A. I would be restless and my heart would pound and I could feel the bed shake. After I had gone to sleep I would have these nightmares, troubled dreams. Most of them were connected up with hearing men hollering. These fellows had liquid fire on them and were hollering. I would want the fire put out. I imagined I had it on myself sometime.

Q. Did you ever encounter any liquid fire?

A. Not personally. I never got any.

Q. After a night of that kind were you able to work the next day?

(Deposition of Carl F. Noble.)

A. Yes, I guess so, but the next night it would be worse. I quit in the best weather we had and just done nothing when I should have been working. I just turned my stock out and done nothing. [104]

Q. Then the next working season in the spring of 1920, did you put in your crop that year?

A. With the help of my brother.

Q. Were you able to do the heavy work that spring?

A. No. My brother done the heavy work. I done the easiest of the work.

Q. Were you able to do even the easy part of the work continuously, or was it interrupted?

A. I done it, yes. We done considerable day hiring, that is, hiring a fellow a few days at a time.

Q. Why?

A. I wasn't able to go ahead with the heavy work. I was picking out the easy jobs.

Q. Were you in such physical condition that you could conduct your ranch at that time?

A. No, that is, I couldn't do it myself.

Q. Prior to the time you went into the war were you able to put in your crops such as you were putting in those years with the help of this brother?

A. Yes.

Q. Had you put in crops of that kind?

A. Yes.

Q. Before the war?

A. Yes.

Q. Did you do it without help?

(Deposition of Carl F. Noble.)

A. I had help part of the time, but this help I had was clearing the land of the stones.

Q. Then did this brother ever help at that time?

A. As far as putting in the crop.

Q. Were you able to do it alone before entering the army?

A. Yes, in fact I didn't have teams. I had to do it myself. I didn't have the equipment to hire extra help.

Q. How long did this condition last? Did you recover from that [105] at all, or did it get worse?

A. I recovered. I got to feeling pretty good and then I had one of the neighbors come in and help to do the summer fallowing. My brother was figuring on taking on the lease land we had and farm it for himself. I was taking just the land I owned up until that time. We had been farming the entire amount of this land every year. In the summer of 1920 my brother decided he would take this lease land and farm it while I would farm my own for the crop of 1921. I hired Roy Bigler to do a good deal of the plowing. I paid him \$137.00.

Q. Why did you do that?

A. To get him to do the work so I wouldn't have to do it. I was unable to do it.

Q. Then after the plowing was done did you get the crop in?

A. Yes.

Q. Did you put that in yourself?

A. I believe I did.

(Deposition of Carl F. Noble.)

Q. Did you have any help?

A. I don't recollect that I did. I put in winter wheat, at least most of it was winter wheat. That was the fall of '20. I had only about 40 acres to put in in the spring of '21.

Q. What was your condition during that year of 1920 to the spring of 1921?

A. It wasn't as good as it had been. I was up and around awhile in the spring.

Q. Did you still have this dizziness and shortness of breath?

A. I had pains in the left chest, palpitation and was still rigid. I would find myself gripping my teeth together.

Q. When did you get married, Carl?

A. In April, 1928. [106]

Q. In the year 1921 what was your condition and the ability to work?

A. About the same as it had been in 1920. I was rigid and nervous and had upon exertion shortness of breath and at times would get light headed and dizzy.

Q. Did you have to have help in putting in the crop of 1921?

A. I had about 40 acres to put in that spring. My brother was batching with me, but we farmed separately. I had about 40 acres to seed. I had no plowing to do.

Q. All you had to do that spring was put in that 40 acres of seed?

A. Yes.

(Deposition of Carl F. Noble.)

Q. When it came to harvesting the crop of 1921 were you in the same condition?

A. I was in the same condition and hired the harvesting done.

Q. In 1922 what did you do if anything, with reference to putting in your crop?

A. I put in 40 or 50 acres of crop that had been already prepared. I seeded it and that is all I done in the spring of '22. I done nothing since.

Q. Had your health been different, would you have put in more of a crop in 1922 than you did?

A. No. I wouldn't have put in any more irregardless of my health. I was summer fallowing and raising better crops than I did when I had bigger acreage and it cost me less than to have this done and done good than to have somebody go over all this ground, and I wasn't able to do it myself and any way I don't know as I would have as I had this other system of farming.

Q. From 1922 on have you done any work at all?

A. No work only lounging around the house helping get some meals, or getting some meals, but I have done no farm work. [107]

Q. From 1922 on you have been in hospitals a great deal of the time, have you not?

A. Yes. I have.

Q. What hospitals have you been in?

A. The first hospital was the Deaconess in Great Falls and the other hospitals have been the Government hospitals in Helena and St. Paul, and I was in the hospital at Lewistown.

(Deposition of Carl F. Noble.)

Q. How frequently have you been in hospitals since 1922?

A. I wouldn't say that I had been there frequent. I come to the Government hospital in 1923 in Helena. I was here about six weeks I guess. I went home in June. I believe it was May. Then in February I was sent to St. Paul and was in bed 13 or 14 months.

Q. What hospital?

A. Aberdeen. The Veterans Bureau Hospital. Then I don't believe I was in the hospital again until 1931, when I was up here to Helena for about six or seven weeks. That was in the spring of 1931, and in the spring of 1932 I was up to Helena for a few weeks and this spring again in 1933 I was in. It has been only in the spring when I was in the hospitals.

Q. This long period of hospitalization in St. Paul you say started when?

A. It started in February, 1924.

Q. You were there for——

A. Until April, 1925.

Q. From 1925 up until 1931 were you able to do any farm work or any work of any kind?

A. No.

Q. Has that been true ever since 1922?

A. Yes. Just the same.

Q. How long have you been in the hospital now?

(Deposition of Carl F. Noble.)

A. I went to a hospital I believe about the middle of March in Lewistown,—I couldn't say—some time in March I believe, and have been in hospital ever since.

Q. During the periods of that time when you have not been in the hospital have you received medical attention from various doctors?

A. Yes.

Q. What doctors?

A. Dr. Freed of Grass Range and Dr. Attix of Lewistown, and Dr. Wallin of Lewistown. I went to see Dr. Porter before I applied for any compensation. That was the only time I ever saw Dr. Porter and he advised me to apply for treatment.

Q. Have you received from the druggists other than that prescribed by a doctor?

A. I have received medicine from a druggist ever since 1919. Since November, 1919.

Q. You also were treated and operated on by the clinic in Great Falls?

A. Yes, I was.

Q. How long were you in the hospital that period?

A. I believe it was three weeks. That was in June or July, 1922. I was there the 4th of July I am sure.

Q. That is all. You may cross examine.

Cross Examination by D. D. Evans:

Q. Did you have the flu in Luxemburg?

A. I did.

(Deposition of Carl F. Noble.)

Q. How long?

A. I expect ten days or two weeks, that is, that I was sick.

Q. When you were discharged the doctors, you stated in your direct examination, put some instrument to your chest and listened, did they not?

A. I believe they did. [109]

Q. Did you notice whether a doctor put a stethoscope or instrument over your heart and listened at that time?

A. I do not know where they put it. They was listening to everybody and everybody got the same treatment.

Q. You do remember they had a stethoscope?

A. I think so.

Q. How large a farm did you have at the time the war ended, Mr. Noble?

A. There were 860 acres altogether; 400 acres was my own.

Q. Of this 860 acres total how much was cultivated land?

A. Well, there was about 200 acres on my own place that was cultivable and there was about 120, I believe, on the rest of it.

Q. What did you raise mostly?

A. Raised wheat. I had some cattle, about 14 or 15 head.

Q. What was your practice as to summer fallowing. How much of this ground did you summer fallow in 1919, 1920, 1921, and 1922?

(Deposition of Carl F. Noble.)

A. There was very little fallowed. I believe there was a piece of about 15 acres summer fallowed in 1919, but after 1921 the 200 acres on my places was split up. I only farmed 100 acres each year and summer fallowed 100 acres.

Q. Do you remember what your yield was from this 100 acres in 1920, 1921?

A. I really don't know, but I do know what it was in 1923.

Q. What was it in 1923?

A. Over 5000 bushels, I should say about 5300 bushels.

Q. What was wheat worth at that time?

A. It was worth about \$1.00 a bushel.

Q. Since 1923 have you still continued to own that 200 acres? [110]

A. Yes.

Q. You haven't done the work on it, but you have had it farmed under your supervision?

A. Yes.

Q. Have you continued that practice of summer fallowing of about 100 acres?

A. I have until the last two years.

Q. What happened the last two years?

A. I have put it all in.

Q. How have the bushel returns been. I don't mean in regard to the price?

A. We haven't been getting no crops at all. Two years ago I thrashed all bushels; that was in 1931. Last year I thrashed 850 bushels.

(Deposition of Carl F. Noble.)

Q. That is all off the whole 200 acres?

A. I have got 640 acres of my own.

Q. You bought some land since?

A. Yes.

Q. How much crop land?

A. Just about the same. The 200 acres of good farm land, I let some of the cultivated land go back on the original.

Q. In 1919 and 1920 how much stock did you own?

A. I let my brother have what cattle I had in the fall of 1920 because I didn't feel able to take care of them. There were about 14 or 15 head and I sold them to him.

Q. How many work horses did you have in 1919 and 1920?

A. I couldn't say as to that. I had 8, maybe 12.

Q. How many did you customarily work at that time?

A. We worked 8 on the plow.

Q. Did you have enough harness and horses to handle two outfits?

A. Not 8-horse outfits,—an eight and a four.

Q. You had then enough horses and so forth to set up 12 head of [111] horses for work on the farm?

A. Yes.

Q. You had farm machinery for your needs?

A. Yes.

(Deposition of Carl F. Noble.)

Q. Did you have any other stock except the horses and cattle, the cattle having been sold in the fall of 1920?

A. I usually had two or three hogs.

Q. You never handled sheep?

A. No sheep.

Q. I suppose a few chickens and that sort of thing?

A. Yes.

Q. Your main dependence in your farming operations was your wheat?

A. Yes.

Q. How was your average crop from 1923 until 1928 or 1929, when you said you had very poor results?

A. We had average crops,—I didn't say,—20 bushels or such a matter. If it fell below 20 bushels, I felt I wasn't getting much.

Q. To the acre?

A. Yes.

Q. How did it average up with the farmers adjoining you?

A. Away ahead of them.

Q. Was that because of their failure to use your modern farming methods? Or were they less skillful than you in farming?

A. They didn't use the right system.

Q. You used the same system and lived on the farm all these years, directing the operations?

A. Yes.

Q. What doctor did you first consult and when?

(Deposition of Carl F. Noble.)

A. The first actual doctor I consulted was Dr. Larson, I believe, in June, 1922, but I had been going to the druggist, Gillespie. At this time he told me I had appendicitis and I had better go up and have Dr. Larson give me an examination and operate if necessary.

Q. Gillespie is the druggist at Grass Range?

A. Yes. [112]

Q. What month in 1922 was that you saw Larson?

A. I believe that was in June or July.

Q. You first made claim to the Veterans Bureau in 1923?

A. Yes.

Q. Then you were examined by Dr. Richards and some other doctors in Billings?

A. Yes, in Billings.

Q. After that you came to Helena and were examined by doctors in the hospital in Helena?

A. Dr. Lipscomb, I believe.

Q. Then you went to St. Paul and were in the hospital there?

A. I went back to Lewistown and after I had been in the hospital here at Helena I went back home in May or June, and I think perhaps in December when they sent me to Dr. Biddle in Lewistown, and my compensation was cut, but he said I was getting hospitalized, and I was sent to St. Paul.

Q. When did you first see Dr. Porter in Lewistown?

(Deposition of Carl F. Noble.)

A. I believe that was in December, 1922. It might have been in January of 1923.

Q. That is all.

Redirect Examination, By Mr. Molumby:

Q. Since 1922 have you attempted to do any farm work yourself?

A. No. I have not had no team in the field since in the spring of 1922.

Q. What farm work, that has been done, has been done by hired help?

A. Absolutely.

Q. That is all.

CARL F. NOBLE

Plaintiff's Exhibit No. 1.

HONORABLE DISCHARGE FROM THE
UNITED STATES ARMY

(Seal)

To All Whom It May Concern:

This is to certify, That* Carl F. Noble **2381589 Corporal Supply Co. 60th Infantry the United States Army, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of** Circular 252 W. D. 1919

Said Carl F. Noble was born in Gustaviss, in the State of Ohio. When enlisted he was 29 5/12 years of age and by occupation a farmer. He had Blue

eyes, Brown hair, Ruddy complexion, and was 5 feet 6½ inches in height.

Given under my hand at Fort D. A. Russell, Wyo., this 30th day of July, one thousand nine hundred and nineteen.

H. C. Smith
 H. C. Smith
 Major A. G. D.
 Adjutant
 Commanding.

Form No. 525, A. G. O. *Insert name, Christian name first; e. g. "John Doe"

Oct. 9-18 **Insert Army serial number, grade company and regiment or arm or corps or department; e. g., "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department"

***If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

3-3164

(Seal)

[114]

(Reverse side Plaintiff's Exhibit No. 1)

ENLISTMENT RECORD

Name: Carl F. Noble Grade: Corporal Y
 Enlisted. Sept. 20, 1917, at Lewistown, Montana
 Serving in First enlistment period at date of discharge

Prior service:* None.

Noncommissioned officer: Corporal March 18, 1918

Marksmanship, gunner qualification or rating:* Not qualified

Horsemanship: Not mounted.

Battles, engagements, skirmishes, expeditions; Verdun Sector Oct. 6 Nov. 11-1918 Vosges Sector June 16-July 4-1918-July 14-Aug. 23 1918 St. Mihiel 9/12/18 to 9/16/18 Meuse Argonne Oct. 6-Nov. 11-1918. Cited for devotion duty during St. Mihiel offens. & Argonne 12-31-18

Knowledge of any vocation: Farmer

Wounds received in service: None

Physical condition when discharged: Good

Typhoid prophylaxis completed Oct. 25-1917

Paratyphoid prophylaxis completed: Oct. 25-1917

Married or single: Single

Character: Excellent

Remarks: Service; Honest and faithful. No A. W. O. L. or absence under G. O. 31 W. D. 1912 and G. O. 45 W. D. 1914

Entitled to travel pay to: Lewistown, Montana

Signature of Soldier: Carl F. Noble

C. R. Farmer

C. R. Farmer

1st Lieut. A. G. D.

(Stamps and endorsements not copied)

Commanding.....

Personnel Adjutant. [115]

Plaintiff's Exhibit No. 2.

Grass Range, Mont.

Jan. 22, 1931.

Director's Office

Jan. 27, 1931.

Received.

Director U. S. Veterans Bureau

Washington D. C.

Dear Sir:

I hereby ask that I be given \$57.50 per month from date of discharge on my War Risk Insurance Policy; on the basis of a permanent total disability, from date of discharge. Said disability is due to my military service.

Respt yours.

Carl F. Noble.

C-1 242 376

[Seal] [116]

Plaintiff's Exhibit No. 3.

VETERANS ADMINISTRATION

[Seal]

Washington

April 1, 1932.

Mr. Carl F. Noble,
Grass Range, Montana

In Reply To: FDB
NOBLE, Carl F.

C-1 242 376

Dear Sir:

This is with further reference to the above entitled claim. You are informed that a decision was rendered of Oct. 17, 1931, by the Insurance Claims

Council to the effect that the evidence is not sufficient to establish a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.

You may consider such denial final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended.

If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record,

The case folder is being forwarded to the Veterans' Administration at Fort Harrison, Montana. Any further inquiries concerning your claims should be directed to that office.

By direction,

Insurance Form 909

H. L. McCoy

[Seal]

Director of Insurance. [117]

Filed October 29, 1934.

Whereupon the hearing was continued until Tuesday morning October 30, 1934, at ten o'clock A. M.

Tuesday, October 30, 1934

Ten o'clock A. M.

Whereupon,

JOHN BOLLICK,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is John Bollick. I live at Grass Range. I have lived at Grass Range about fourteen years. I am acquainted with Carl Noble, the Plaintiff in this action. I first met him at Gettysburg, Pennsylvania. I was in the army. I was in the army at that time. As to what outfit I was with, I was with the 60th Infantry, 5th division, United States regular army. I was in the same outfit with Carl Noble. The same company and the same regiment. I was in the 5th division before they were at Camp Gettysburg. He joined the 5th division at Gettysburg, Pennsylvania. From that until the Armistice was signed I was with him constantly. After we left Camp Gettysburg, we went to Camp Green, North Carolina. While we were at Camp Green Carl Noble was taken down with the mumps at Camp Green, North Carolina, and swelled up, and I had to do his duty, he was at the infirmary several times marking "duty".

Q. What, if anything, occurred with reference to the mumps at that time?

A. He was swelling up——

Mr. BALDWIN: I would like to inquire whether you are telling what he told you, or telling what you saw?

A. I saw it.

(Testimony of John Bollick.)

Witness Continuing: I observed with reference to his mumps [118] after that that he was swollen at the neck, and he was swollen at the groin, below. We were in the same Camp together. As to what I observed with reference to his testicles, they were swollen up. As to what occurred with reference to any treatment of the mumps, he went over to the infirmary on a sick call, and they marked him "duty". He did do duty while in that condition. As to nature of the duties that he did perform, he performed the duty around there as assistant wagon master. As to what work is involved in that, it is bringing rations from the rail head to supply the regiment, and also equipment for the regiment of different kinds. As to whether his duties required him to do any drilling or marching, at different times he drilled. He did drilling or marching while in that condition. I do not recall any particular occasion of marching, but I know we were out at several drill times at that time, and fire drills, one thing or another at different times in that time. From Camp Green we went to Hoboken, New Jersey. His condition at that time was the same. We were at Hoboken about two weeks. We were not doing duty at Hoboken, we were laying there in quarantine; waiting for orders for overseas. At the end of the two weeks we procured orders to go overseas. Carl and myself went over on the same boat. I will describe his condition at that time; he complained of his mumps; his mumps had been still bothering him, and he had to do fatigue work on

(Testimony of John Bollick.)

the boat, like gathering stuff and cleaning up the boat. Of course, Carl did not do much work at that time, but still he was on duty.

Q. Describe his condition as it appeared at the time you first noticed this swelling below on him?

A. Well, his condition, his neck was swollen, and down below [119] here (indicating) he was swollen, and he wore a cloth around there to protect himself.

Q. What was observable with reference to his walking, if anything.

A. He walked straddle legged.

Q. Did that continue after that, and for how long did you notice?

A. Well, I noticed that Carl, when we were on the boat, that he was still that way until the time they hit Champano, France. That is at the point that we disembarked in France. We were at that place about twelve or fifteen days. We did not all of us go over on the same boat. Our outfit was again reassembled while we all together at Barchoo, France. I couldn't tell you how to spell that. That is the place that we disembarked. From that Camp we went up to Alsace-Lorraine. We went into shell fire in the Alsace-Lorraine region. As to how long we were under shell fire at Alsace-Lorraine, if I remember rightly, it was about fifteen days. From there we went to another sector, between St. Mihiel and Alsace-Lorraine. Carl was with me when we were up at Alsace-Lorraine, he was with me all through. He was with me at the second place that

(Testimony of John Bollick.)

I mentioned. I believe I recall what they called that sector, I believe it was St. Die. I could not tell you just how long we were there, I think somewhere around about fifteen or twenty days. We were under fire at that time. That was front line service. The general duties of the outfit that Carl and I were in, was to supply the regiment, and keep provisions for the men fighting on the front. He would get the provisions at the rail head. He would bring them up to the front by wagon trains. After we left the second sector that I referred to, we went to St. Mihiel. As to how long we were on that front at St. Mihiel, it was somewhere around about twenty or twenty-five days. Carl was with me at that time. As to whether [120] anything occurred on the St. Mihiel affecting Carl's health, Carl was gassed on the front at St. Mihiel along with the rest of us. There were about fifteen of us gassed. As to how that affected Carl, he vomitted when he got this gas. He reported with the outfit to Captain Morris, and there was never anything done, although Carl vomitted, and had diarrhea at that time. That was the same experience as the other fellows that were gassed. I was gassed at the same time. After we left St. Mihiel we went to Meuse Argonne. As to what portion of the Argonne we went, it was around Mount Picau. The nature of the country around Mount Picau is sort of a forest. With reference to whether it is level ground or otherwise it is rolling, hilly, mountainous; sort of mountainous country. As to what occurred to Carl while on the Argonne,

(Testimony of John Bollick.)

Carl was driving a team. I saw it and observed him myself. Carl was riding a mule, and there was a driver that could not drive his team. Carl said, you ride this mule and I will drive your team. He got on the wagon and there was a shell blowed up, and cut the brake rod, and the team went to the bottom of the mountain, and Carl was mixed up with the rations at the bottom of the mountain. I stopped and helped him out, and when I got to the bottom, the Captain said, Let us go. He said, We cannot stop, we have men to take care of those. We went on the front. There was about five days that I didn't see him. As to how this shell hit, it hit on the road and drove a big hole out in the road, and tore parts of the wagon off, that is, the side part, it went through the side part, and part of the end-gate; it blowed part of the end-gate off, and Carl went to the bottom of the mountain with this team; they would hold back, and they went to the bottom of the mountain. I said I didn't see him again for about five days. As [121] to his condition when I saw him after that. He was up. If you would ask him anything he would flutter, his hands would go, he would stutter, and at numerous times I would ask him for rations, when we were dishing out rations his hand would shake like that (indicating), and he would stutter, hands shake, and looked like a man that was about twenty years older. Prior to this occurrence Carl did not stutter that I know of.

Q. How long after this occurrence at Mt. Pican, were you in the Argonne?

(Testimony of John Bollick.)

A. In the Argonne, we went in September, and stayed there until November 11, when the Armistice was signed. We were getting ready to go over the top again when the Armistice was signed. As to how long had this occurred before the Armistice was signed, I presume it was along in October, about the 20th of October when this had happened. After the Armistice was signed we went to Esch Luxemburg. That is part of Germany, a little bit of a country by itself, a little country between Belgium and Germany. We were there until the 4th day of July, 1919. We were doing duty while up in Luxemburg, the duty was mostly drill; we discarded the wagon train, and we did mostly drilling. Carl was in the supply company during this time. I saw him every day. He was not doing any duty to speak of at all at that time. He was in one of the billets then in Esch. As to what I refer to as billets they had been the homes of German families, and they moved us into that billet, or those billets, they called them billets. As to what occurred to Carl with reference to his physical condition while in Luxemburg, he reported to the infirmary with me every day with the flu. As to how the flu affected him, he looked awful pale, and was awfully nervous at this time. I don't know that I noticed anything else with reference to his condition after he [122] had the flu.

Q. Do you recall anything with reference to his breathing?

Mr. BALDWIN: We object to that as leading. The man said he did not recall anything. We object to it as suggesting the answer.

(Testimony of John Bollick.)

The COURT: Sustain the objection.

Q. Do you recall noticing anything else with reference to his condition after he had the flu?

Mr. BALDWIN: We object to that as unnecessary repetition. He said he did not recall.

The COURT: Sustain the objection.

Q. Now, will you describe, or after you left Luxemburg in July, July 4, 1919, where did you go from there?

A. We come back to Brest, France. As to what we did at Brest we stayed there for examination for back home to the United States. We were shipped back to the United States then.

Q. Just describe to the jury Carl's condition at that time?

A. When we were shipped to the United States?

Q. At Brest, before you left for the United States?

A. Well, he was nervous, and he looked awfully pale, and shortness of breath, and if you would say anything to him, at times, he would fly just right off, his hands would flutter and it would take him fifteen or twenty minutes to tell you a word. As to what else I noticed with reference to his appearance at that time, he looked like a wild man. I will describe how he looked, his eyes looked glassy and bulged, and he just looked like a wild man. His hair was plumb white. It was not that way before he went overseas. I came back on the same boat with Carl to the United States, to New York. After we

(Testimony of John Bollick.)

arrived in the United States we went to Camp Dickson, New [123] Jersey, to be discharged, and he was sent to Fort D. Russell, Wyoming. As to when I again saw Carl after I left Camp Dixon, I saw him on the 26th day of June, 1920. That was after we both were out of the army.

Q. What was his condition when you last saw him before you were discharged, as compared to what it was when you last described him to the jury.

A. Well, when I saw him last at New York his condition had never changed, if anything he was worse when I saw him in 1920.

Mr. MOLUMBY: You got me wrong on that.

Mr. BALDWIN: He has answered the question. We object to your getting him——

Q. John, describe the condition he was in when you left New York as compared to his condition, the condition he was in at the time that you were on the boat that you described, or at the time you left Brest, which condition you have already described to the jury. How did that compare at that time?

A. Well, about the same. I stated I saw him again in 1920; that was at Grass Range, Montana. That was on June 26th, 1920. As to how I happened to see him at that time, I came out to see Carl, and stayed right there at Grass Range. As to whether I stayed at his home, I was up at Carl's home about five days. I will describe his condition to the jury

(Testimony of John Bollick.)

as I saw it at that time: At that time he was just as I left him in New York, he was nervous and he was pale, awfully pale in color, and he looked like he was aged up twenty years. As to whether he was doing the work there when I was there on the farm, he would try, get out and try to work; fly off the handle; he would try to tighten the bolts on his plow; he would get so nervous he would go and lay down. I have seen him from that time on frequently [124] some times three or four times a month, some times every day in the month. As to where I was living during that period from that time on, I was living with a man by the name of Shaw. He was the next neighbor to where Carl lived.

Q. In 1920, during that year in 1920, do you know what work he did or attempted to do on the ranch, if any?

A. Well, he didn't do any work at all. He hauled a load of grain or two to town here and there, and milked a cow. He had a man working on the farm then, his brother, and the next year his brother and him dissolved partnership, and he had a man named Ora Trapp working on his farm.

Q. Has he since he got out of the army, or after you saw him in 1920, has he ever done the work on the farm?

A. No sir. He has at all times that I know of, that I saw him in 1920, had help on the farm there. They were men that he hired. I don't know how

(Testimony of John Bollick.)

he and his brother had things arranged, whether they were on half shares, or how that was, but I know the next man he hired was Mr. Trapp. He hired him to work there by the month. As to how big a place he had there at the time that Mr. Trapp was there, I think it was around about 600 acres. There were about three hundred acres of that susceptible of cultivation. As to how much would be put into crop each year, he would put in about one hundred and fifty acres. Mr. Trapp did put in the crop alone.

Q. Did Carl's brother, Ferd, help him at any time?

Mr. BALDWIN: Object to this as leading.

Q. After 1920?

A. Yes, Ferd used to go there.

Mr. BALDWIN: I object to that as leading.

The COURT: Yes, it is leading all right. [125]

Q. Did any one other than Mr. Trapp ever work on that ranch after 1920?

A. Yes, he had several persons there after 1920. In 1920 he and his brother worked there together; his brother and he had the ranch together. Carl did not do any of the work himself, outside of milking the cow, and probably bringing in the wood; he did a little cooking at the house and brought in some wood, or maybe milked a cow, or fixed a plow, or something that the hired man or Ferd sometimes could not fix, or did not know how to fix it, he would go out and fix the plow, that is tighten up some

(Testimony of John Bollick.)

bolts, or something on the plow. In 1921, the next year, if I remember rightly, I think it was Mr. Trapp that was on the place. As to how they operated the place there after as compared to what he did the year that I described, he had a man there every year on the farm, running the farm. With reference to any medical treatment or hospitalization that Carl had, I know he went to the hospital several times he was at Fort Harrison I think in 1923, and different other times. I could not tell just how long he was in the hospital. I did not keep any record of it. I know he was in the hospital several times since.

Cross Examination by Mr. Baldwin:

I enlisted in Gettysburg, Pennsylvania. I had seen Carl Noble before that time. I saw him at Gettysburg, Pennsylvania, when we went in for inoculation. I had not seen him before my army service. As to how tied up with the same outfit, he from Montana, and me from back there, we were a regular army outfit and they shipped men from Washington and from the east to make this 60th infantry, which was the old 7th infantry, made it into the 60th Infantry. There was no 60th before the war. [126]

Q. As I understand it you were in the regular army before the war was declared with Germany, April 6, 1917?

A. I was in June 26, 1917,—September 26, 1917.

(Testimony of John Bollick.)

Q. Well now, you have spoken about a regular army outfit. What do you mean by that?

A. A regular army outfit is not a drafted army, or national guard, it is a regular army outfit that required one hundred regiments.

Q. How did you get in that, if you did not enlist, or get drafted?

A. I enlisted at Gettysburg, Pennsylvania.

Q. And you don't think that the four million men that went overseas were in the regular army?

A. Some of them were not; some of them were in the national army.

Q. Just draw that distinction, the regular army and national army. What is the difference?

A. The regular army requires one hundred regiments, and over one hundred regiments, as it was told to me, they are a drafted army, or army for the duration of the war. I enlisted so that I was in the regular army and not in the national army. I noticed this swelling in Noble's neck at Camp Green, North Carolina. I did go with him to the infirmary. I was sick at the time, I had the jaundice. They did not give me any treatment. They said I had the jaundice. As to what they said was wrong with Noble, they said he had the mumps. The major said that who was in charge. He was a medical officer. He did not give Noble any tests. I heard Noble's deposition read here yesterday. I never saw him give any medicine. I heard the deposition read. [127]

(Testimony of John Bollick.)

Q. You heard it repeatedly stated in his deposition that he received no treatment, and they sent him back?

A. They sent me back with him because I had the sick report.

Q. And did he get a sick report?

A. Yes, he was on sick report.

Q. Did you hear anybody in the medical corp of the army tell Noble that he had the mumps?

A. I heard that major in there say he had the mumps.

Q. I am asking you about the medical corp.

A. That is the major doctor. He told him he had the mumps. He said he had the mumps.

Q. Did he say he had them, or had had them?

A. He said he had the mumps.

Q. Where did he say that?

A. Right there in Camp Green, North Carolina.

Q. What place in Camp. Where was the major when he made that statement?

A. It was in the barracks somewhere, they had their medical examination. I could not tell just where they held their medical examinations, and the time and place. I could not tell you just the right space in the barracks. I know we were there twice that morning. He was sent back to duty. I had noticed the swelling in the neck for about two weeks before that time. He had the swelling in his neck for about two weeks before I heard the major tell him he had the mumps. I was quarantined in

(Testimony of John Bollick.)

the latter part of April, I think it was in April. I could not just call the date right.

Q. All right. When was that with reference to the time that the major told Carl Noble he had the mumps?

A. Along in April. [128]

Q. The question is, whether you were quarantined before or after you heard the major make that statement.

A. I was quarantined afterwards. I could not tell you how long afterwards. I could not give you an approximation, I just could not say about how long afterwards.

Q. Don't you know how long you were quarantined? Cannot you tell us whether it was days, hours, weeks, or months?

A. We were supposed to—

Q. I am not asking about suppositions, I am asking you whether you can tell us when you were quarantined?

A. No, I can not. I was quarantined for the mumps. Noble was not quarantined.

Q. You had the mumps then?

A. I had the mumps when I was a boy.

Q. You had them again in the army?

A. No sir.

Q. What were you quarantined for?

A. I was quarantined because the man had taken down with the mumps in the next tent to me. I could not say who was the man that was taken down in the next tent. They quarantined me because

(Testimony of John Bollick.)

someone else had the mumps. They did not quarantine Noble when he had the mumps.

Q. It is a custom in the army when a man has the mumps, they quarantine the man that was closest to him?

A. They did not quarantine him.

Q. Answer the question, it was usual in the practice in the army at that time in the division that you were in to quarantine a man that had the mumps.

A. I know I had not the mumps.

Q. Answer the question. [129]

A. Yes, it was. I didn't have the mumps. I was quarantined. I was quarantined because I had been close to some man that did have the mumps. They did not quarantine Carl Noble at any time in that Camp. At that time Carl's job was wagon master, meaning to haul rations from the rail head to the regiment, and equipment, such as guns and ammunition. When I speak of the rail head, I mean the supply depot, or quarter master department, which ever you may call it. He continued in that particular department throughout the war, or his service in it, as the wagon boy.

Q. Directing the work of others? What was his job as wagon boy, to direct the work of others?

A. He was wagon boy.

Q. In other words, he was sort of a foreman on the job?

A. A foreman, yes, and directing others as to how they should do their work. He did a good job

while he was in the army on that work. He knew what it was all about, and carried on his work well.

Q. Very competent in directing the work of others?

A. Well, I wouldn't say.

Q. You saw the work done, you saw how the supplies came in and how the wagon trains were handled, was it good or bad?

A. Well, I might say it was good. That is the line of work that Carl performed all through the army. He did enter into the trenches, when we would be up in the front, lots of times we would have to go to the front line trenches for a meal; we could not get back to the supply company.

Q. He was not up there with a gun in his hand doing any fighting?

A. Lots of times we had to take a gun just the same. [130]

Q. I am asking you what Carl Noble did?

A. He had to go up to the front with his rifle when he went up to the front. His job was to convey supplies from the rail head to the front.

Q. Or when the men in the front trenches were under fire, he would be probably at the rail head miles away?

A. Not always.

Q. I am asking you if on many occasions that wasn't true?

A. On some occasions.

Q. What time did he spend actually in the front line trenches?

(Testimony of John Bollick.)

A. I could not just say that. We were one hundred and five days in shell fire. I can answer to that. He was not in the front line trenches during those one hundred and five days at all times. I could not say how much of that time he was in the front line trenches. I stated that Carl walked straddle legged and that he had a swelling in his neck, and he had a swelling in his groin and that his testicles were swollen. He did show me his testicles. As to whether he showed them to the rest of the boys, he did to some of them; that was at Camp Green. I was in the infirmary with him when he had that condition. I presume he showed his condition to the medical men in charge there I was with him. I did not see everything that he saw; I heard what he said. I could not say that he told the medical men in the infirmary that his groins were swollen. I could not say that he ever told them that his testicles were swollen. I did see a medical officer in that infirmary make an examination of his groin or testicles; that was at the time I reported at the infirmary with him, sometime in April, and his testicles and groin were swollen then. I say the medical officer examined him. The medical officer asked him if he had been injured, if [131] I recall rightly they asked him if he was injured there, and he said no, he had the mumps but he was over them then, or something in that manner.

Q. What did the medical officer say?

(Testimony of John Bollick.)

A. He said he had the mumps but he was over them, in that manner, he was over the mumps, or something in that manner.

Q. What officer was it that made that statement?

A. The Major. I couldn't tell you what major it was. I couldn't just say his last name now.

Q. You said a minute ago?

A. I said the major. I did not say his name.

Q. I thought you did?

A. No.

Q. And he told Noble to get back to work?

A. He marked him duty.

Q. That is exactly what that means, get back on the job, is it not?

A. Yes.

Q. In other words, he was fit for work, or ordered to go back to it anyway.

A. Yes. Fatigue work means cleaning up around a camp. This fatigue work that Noble did was on the boat, it was picking up cigarette stumps around this boat; he was in charge of the men, swabbing up the deck, and picking up cigarette stumps, and some things like that.

Q. In other words, he was still continuing the bossing?

A. Yes.

Q. And he continued to boss them during the time he was in the service?

A. Well, he did, but I would say that he was not like he was [132] when I entered the service; he was awful nervous and flighty.

(Testimony of John Bollick.)

Q. That is not responsive to the question. The question was did he continue to boss the men during all the time he was in the service?

A. Yes sir. In other words he had one of the top jobs. As to how many men he was directing, it was a battalion, I would say about thirty-five or forty men. I say he was the boss wagon man. He had thirty-five men engaged in that employment under him all the time during the war. He was never taken out of the top job, or the boss's job. Nothing happened to Noble that I know of while we were under shell fire in Alsace-Lorraine. There was something happened while we were under shell fire in the Argonne field there was a shell blew up on the road that tore part of the end-gate, cut off a brake rod, and Carl's team went to the bottom of the mountain and mixed up with a lot of rations. I was in the wagon train when that happened. I was under his direction during the time I was in the army, and all of the time. At the time of that occurrence I could not have been over one hundred yards or two hundred yards away; I was following him, about one hundred yards or two hundred yards away. After this occurrence I did not see him for about five days. I know what his condition was after that happened, after the five days, but not after the occurrence. As to where I was when I next saw him after the five days had passed, we were in a camp, moving into the front general line, we were spread out in the woods somewhere in

(Testimony of John Bollick.)

the brush; some were in the brush, anywhere at all, or under trees, so that the airplanes could not locate them. I was employed in carrying supplies to the front; in other words supplying needs of the soldiers in the trenches. Noble came back and took his same old place, he was wagon master. He did not lose any of his authority [133] over the thirty-five men that he was directing because of his condition. I did not notice any difference in the work in that division that was under him before and after that five day period.

Q. In other words he carried on his work the same as he did before?

A. I think it was done through excitement more than anything else.

Q. Well, he must have been pretty excited to continue to do that until he got back to Hoboken?

A. We didn't arrive in Hoboken.

Q. Where did you land?

A. We landed in Long Island. He directed the work of that wagon train with thirty five men until we got back to the United States. The work went along right under his direction. So far as my observations went, it went along just as well as it had before this shell explosion. Men at the front lines, at the front line trenches got their ammunition and food, and everything was going along all right so far as the wagon train was concerned; no hitches because of any ill health; no stopping of supplies

(Testimony of John Bollick.)

because of anything due to Nobles condition during that time. He appeared to be a very competent man, doing a good job. Noble got the gas in the St. Mihiel sector. I could not tell you the date, and he also in the Meuse, Argonne. I was gassed at the same time.

Q. Did you stop work?

A. No, it would not have done me any good if I did have.

Q. Why not?

A. Well, they would mark you duty if you ever went to a sick call. [134]

Q. Depending on how badly you were gassed?

A. Well, I don't know about that.

Q. What is that?

A. I say I couldn't tell about that. I was issued a rifle when I entered the army, and Noble was issued one. I never did go over the top, nor did he. I was with him all the time. It was not a part of my job, nor his job to go over the top.

Q. Why did you state on direct that just before the armistice on November 11, 1918, you were ordered to go over the top?

A. What I meant to go over the top, we were supplying the outfit; we went to the front line trenches; we were right up to the boys, we got in a mix up, I think they were counter-flanked. The Captain ordered us to quit the team and take the rifle and go to the front. In other words, if we went up there to fight, the boys would have had to go without their ration.

(Testimony of John Bollick.)

Q. And you and the men working under Noble were the only means of supply for ammunition?

A. No.

Q. What else did they have besides that wagon train?

A. I don't get that.

Q. I am asking you what other means they had of supply besides the wagon train that Noble was operating at that point?

A. Nothing outside of the ammunition train.

Q. And if you and the other drivers went into the front trenches there would not be any means of supplying that particular division, would there?

A. You mean just me and Noble won the war?

Q. I don't think you won it. I think it took about five million Americans, and lots of Frenchmen.

A. That is what I thought. [135]

Q. It took a lot of people working hard?

A. There was lots of them up in the front besides me.

Q. The question is whether Noble and you, and the rest of the wagonners were in the front trenches fighting, would there be any means of supplying the men in the trenches?

A. They would not if they had captured the wagon trains. We could not go over the top with the wagon trains. If we were all in that trench the wagon train would be tied up. The boys in that trench would be without means of food.

(Testimony of John Bollick.)

Q. For how long did they keep the boys without food so that you could carry a gun?

A. I think we were about four hours in the counter attack, then we went back to the wagon trains. I continued on that job until I left the army. That was not the only time that I was in the front line trenches; I had been there several times.

Q. And were you on duty in the front line trenches several times, that is, getting ready to go over the top?

A. Not getting ready to go over the top, but supplying the boys right at the front. I was gassed the same time that Noble was gassed. I never received any treatment for the gas. I have had a physical ailment since, I have had arthritis and pleurisy I got arthritis at Camp Green, North Caroline, and have had it ever since.

Q. Still you did the work for one year on Noble's farm in Montana?

A. No, I never worked a year for Noble in Montana. I worked for him about two months, about sixty days, I could not say what year it was. I then went to work for a man named Shaw. I worked for Mr. Shaw before I ever worked for Noble. I did plowing for Mr. Shaw.

Q. You were able at that time to do heavy work on the farm, were [136] you not?

A. No, I didn't say I was able to do heavy work.

Q. Well, you did it, didn't you?

(Testimony of John Bollick.)

A. I plowed, drove a team. As to what line of work I have been engaged in since that time, I have been engaged in practically the same kind of work. It would be designated as general farm work.

Q. What kind of farm work did you do?

A. Well, there is a lot of farm work that I didn't do. I was employed by Noble on several occasions, small periods of time. I hauled grain for him and cooked for him, and I plowed one fall. I could not tell you the date of that fall right now.

Q. Now, these dates are important. We want to know when you were there so that we can tell what his condition was in various years. Cannot you give us the year?

A. I could not at this time. I could not say. I know I was hired by Noble on a number of occasions. At the present time I cannot give you the year of any period of my work for him. I could not say that it might have been as late as 1924 or 1925. I couldn't say when I did last work for Noble. I cannot tell what years I was working for him. I cannot tell what year I last worked for him. I cannot tell you any year that I did work for him at any time. As to who I was working for in the fall of 1919, I worked about two weeks for the E. J. Lavia Iron and Steel Company at Marietta, Pennsylvania. I was not in Montana at all in the year 1919. I first came to Montana on the 26th day of June, 1920. I had not seen Noble from the time I left the army until that day, about eight or nine months time I think it was.

(Testimony of John Bollick.)

Q. And as I understood your direct testimony you immediately went to work for him upon meeting him? [137]

A. No I did not. His brother was on the farm at that time.

Q. And there were a couple of hundred acres under cultivation.

A. They had about three hundred acres under cultivation, but about one hundred and fifty acres is what they farmed.

Q. Is one man supposed to take care of that much land on a farm?

A. Well, his brother used to take care of one hundred and fifty.

Q. I am asking you if under ordinary circumstances one man is supposed to do the work necessary on a farm of that size in Montana?

A. No, not all of it.

Q. As a matter of fact that is a two man job.

A. Sometimes six.

Q. And still you think that Carl Noble was not able to work because he could not do the work on that ranch, without hiring a man or two?

A. That was not what I based it on. I could not say how many men he hired in 1920. I couldn't tell you how many men he hired in 1921.

Q. Was it one, or two, or three?

A. Well, at different times he probably had.

(Testimony of John Bollick.)

Q. I didn't ask you about probabilities. I am asking you what you know.

A. Probably at threshing time there would be fifteen there.

Q. I am talking about ordinary times, when ordinary farm operations were going on.

A. Well, he had a man there.

Q. He had a man, but it was a two man job?

Mr. MOLUMBY: He never testified to any such thing. He said it was a six man job at different times. [138]

Q. Does the ordinary farmer take care of the operation and cultivation of three hundred acres of land, and the seeding and harvesting of one hundred and fifty acres?

A. They would at times. There are some men put out one hundred and fifty acres in wheat. That is an exceptional man.

Q. The average man cannot do it?

A. Well, I wouldn't say that. I know lots of farmers that put out two hundred acres and they do their farm work, that is their plowing and summer fallowing with a tractor; they put out two hundred acres. Noble never did have a tractor. All the work that was done on that farm was done with horses in the way of plowing, and things of that kind, eight head of horses and a three way plow.

Q. With that equipment one man could do the work alone?

A. With that equipment?

(Testimony of John Bollick.)

Q. Yes.

A. Well, not exactly, no.

Q. Now, we will suppose that they not only had a eight horse plow but they also used at the same time a four horse plow. You will agree with me that one man could not drive both plows.

A. No sir, he couldn't drive two plows.

Q. As a matter of fact in the work on the Noble farm that is the Carl Noble, that is the way it was done with an eight horse plow and a four horse plow?

A. I could not say whether he had a four horse plow there. I never seen one there. I saw a three way disc plow, eight horse plow. I said after Noble got back to this country he looked pale. There is not anything of the ordinary in looking pale. I would not say how pale he looked, it was pale he looked an awful lot like an orange peel. [139]

Q. In other words, he looked anything but pale then?

A. No, he was pale.

Q. You say he had an orange color?

A. Well, sort of orange color, and his nervous condition, any time you would ask him anything, he would just flutter around, his hands would shake, and he would stutter.

Q. When you were all under his direction in the army, did he stutter and flutter?

A. Yes, after that shell fire, he did, he tried to win the war alone. He done a lot of work. He made

(Testimony of John Bollick.)

the men move up, that was wounded, he said these men had to have those rations on the front. He tried to win the war alone.

Q. But the fact is that he continued after that shell explosion, just the same as he had before, and went right on, right on winning the war single handed?

A. Outside of the time he was in Esch when he was sick and down with the flu, he had shortness of breath.

Q. Outside of that period, he went right on winning the war single handed?

A. I would not say after he was in Esch, there was not much to do; there was hardly anything to do; there were no wagon trains to take out any way.

Q. You didn't see him at any time between the time he was discharged from the army, on or from July 10th, 1919, until you saw him in 1920?

A. I didn't see him, I think it was the latter part of July, 1919, until June 26, 1920.

Q. When you saw Noble in 1920, he was operating the ranch out at Grass Range, was he not?

A. Was he operating the ranch?

Q. Yes?

A. No, he was doing work around the ranch; his brother was running the ranch.

Q. What do you mean by running the ranch?

A. He would take a [140] load of wheat to town, and probably bring back the groceries, and bring back implements, and something like that, machinery, and milk a cow.

(Testimony of John Bollick.)

Q. Who did those things, is that his brother, or Carl?

A. Carl done that and his brother Ferd done the farm work.

Q. Who directed the operations, that is, the planting, what should be planted, and the harvesting, how it should be done, and the selling of the product?

A. I couldn't say. At that time the ranch had about 600 acres in it.

Q. Aren't you mistaken, wasn't the ranch at that time, 300 acres?

A. Well, he had some land leased of his brother's, I think it took in around 600 acres.

Q. But since that time the amount of land cultivated on the Carl Noble ranch, has been increased quite a bit, has it not?

A. I couldn't say that.

Q. You have been in the neighborhood, tell us whether it was or not?

A. Increased?

Q. Yes.

A. I couldn't say that. I would say it was decreased.

Q. Noble has been directing the work on a 160 acre farm ever since that time?

A. I wouldn't say that.

Q. Who has directed the farming on that land of Carl Noble's when his brother went on his own land?

(Testimony of John Bollick.)

A. The man he has working on his farm, Trapp is one of them; Bill Haight was another; he worked there two years. Trapp worked there in 1921 and part of 1922; Haight came there right after Trapp left. I could not tell you when it was that I worked there, because I never worked for him by the year, I only worked with him there just a few weeks at a time, maybe a week or ten days, or through threshing, or hauling grain, or something like that. I could not tell just how long it was. [141]

Q. You think the man that Noble employed told him how to run the ranch?

A. He must have when Carl was in the hospital in Minneapolis. I couldn't say when that was. I did not ever see him in the hospital at Minneapolis. As to whether I saw him in any other hospital, I saw him in the Fort Harrison hospital in 1923. I couldn't say just what time in 1923 that was. That is not the time that Noble was operated on for appendicitis. I could not say how long I was with him in the hospital in 1923 at Fort Harrison. I could not say how long he was away from the ranch at that time, because I stayed at Fort Harrison until spring. If I recall rightly Carl was transferred to Minneapolis and went home, and was transferred to the Minneapolis hospital.

Q. You didn't see him at Minneapolis, that is all hearsay as to what happened there?

A. I didn't see him at Minneapolis. I saw him at Fort Harrison. I saw him on the farm this year,

(Testimony of John Bollick.)

and I saw him last year. I have seen him every year since 1920. I have not been living on the adjoining land, right next to him, all those years. I have been living about four miles from him. As to how frequently I visited the Noble ranch, sometimes I would be up there two or three times a week; sometimes I would go up there every day for a while, probably stay there with Carl a couple of weeks at different times.

Q. The land is good land, is it not?

A. Well, I wouldn't say that. It produced several good crops, I cannot say it is good land.

Q. In other words, in spite of poor land, it produces good crops?

A. With the exception of the moisture they had, they had one or two good crops.

Q. It is a boast of Carl Noble, who has been operating there since 1920, that he has the best farm around in that country? [142]

A. I wouldn't say that.

Q. You heard him say that he was the best farmer out there many times?

A. I heard him say that their farm produced the most wheat, but I wouldn't say that he raised it.

Q. But he, as a matter of fact, he was raising more wheat per acre than anybody in that district during the years you have been there?

A. No, I wouldn't say that.

Q. How did his crops compare with the land that you were working on?

A. About the same.

(Testimony of John Bollick.)

Q. Were the crops good or bad?

A. I couldn't say. I think it was in 1923 we had a good crop, real good crop in there, and that was an exceptional year. Outside of that it was very light.

Q. Now, how much was the average yield of wheat on this land in that vicinity?

A. Well, I would say that real good years——

Q. I am not talking about real good years. You heard the word "average" in that question.

A. Average?

Q. Yes.

A. That would be a hard thing to say. Six or seven bushels, you mean through from that time on until now?

Q. Yes.

A. About six or seven bushels, and that is putting it high.

Q. It may be below that on the average?

A. Of course there is one year there that they had a big crop, and there is lots of years that they had nothing.

Q. What was the year of the big crop?

A. I presume it was 1923 or 1924.

Q. You heard Noble's deposition read yesterday, and you heard him say in that deposition, did you not, that if he did not get twenty bushels to the acre, he thought he was having poor luck?

A. I didn't hear that, no, sir.

Q. So that if he was averaging twenty bushels to the acre, he [143] was doing more than other farmers in that district.

(Testimony of John Bollick.)

Mr. MOLUMBY: He didn't say anything about getting twenty bushels to the acre.

Mr. BALDWIN: He said it was a poor year if he didn't average better than twenty bushels to the acre.

A. I wouldn't say that.

Q. How much did he average per acre, if you know, all through the years?

A. About six or seven bushels all through the years.

Q. Now, in Mr. Noble's deposition we find this:

Q. "How was your average crop from 1923 until 1928 or 1929, when you said you had very poor results?" A. "We had average crops, I didn't say, twenty bushels or such a matter, if it fell below twenty bushels I felt I wasn't getting much."

Q. "To the acre?" A. "Yes". Q. "How did it average up with the farmers adjoining you?" A. "Away ahead of them."

Q. "Was that because of their failure to use your modern farming methods? or were they less skillful than you in farming?" A. "They didn't use the right system."

Q. "You used the same system and lived on the farm all these years, directing the operations?" A. "Yes." Now, in the light of that testimony can you tell me what the average yield per acre of wheat was on the ranch on the Noble ranch or farm, from 1923 or 1929?

A. No sir, I couldn't say.

Q. But you say during those years the average——

A. They had a couple of years, they had good years for about two years then they raised good crops.

(Testimony of John Bollick.)

Q. I am speaking of an average year.

A. Well, I would say six or seven bushels.

Q. That was the average yield in that vicinity on the farms of the same kind? [144]

A. Yes.

Q. And that applies during 1930, 1931, 1932, 1933, 1934, did it not?

A. Yes.

Q. Now, did you ever tell anybody about this explosion, when you were under examination, in connection with the injuries that Noble had suffered?

A. I probably have not, outside of some buddies, when we were talking it over.

Q. You made an affidavit in an effort to help Mr. Noble?

A. Yes.

Q. When were those affidavits made?

A. I think 1923. I made two affidavits, I believe. I probably in one of those affidavits referred to the explosion of a shell.

Q. And did you mention this explosion when he was driving this wagon in either of those affidavits?

A. I probably didn't mention it.

Q. You didn't think it of any importance at that time in 1923—when you made those affidavits?

A. I will say at those times when they asked me for an affidavit a lot of times, you generally overlook something like that.

Q. Well, you were not overlooking the fact that you had been requested by your friend Carl Noble to make affidavits, were you?

(Testimony of John Bollick.)

A. What is that?

Q. You did not overlook the fact at the time you made these affidavits that Carl Noble had asked you to make them, and told the truth?

A. I told the truth.

Q. You did not tell the whole truth?

A. I told the whole truth. [145]

Q. And I suppose you told nothing but the truth?

A. No.

Q. Why didn't you mention this explosion when he was driving this wagon in either of those affidavits?

A. Well, I just cannot say why I didn't. There is a lot of stuff that I should have mentioned in that there, but I didn't.

Q. That is your only explanation. Did you tell them that Carl Noble had come back white haired five days later, in either of affidavits?

A. I don't think I have.

Q. Did you tell them that his hands were fluttering, and he stuttered, in either of those affidavits?

A. No, I did not.

Q. Did you mention anywhere in those affidavits the things that you mentioned here?

A. I believe I have some of them.

Q. What part?

A. Shortness of breath and he was pale.

Q. And that is all you said in those affidavits that you can recall.

A. And I mentioned the mumps.

(Testimony of John Bollick.)

Q. Did you mention the flu in Luxemburg, did you mention it in the affidavits?

A. I presume I have. I recall when those affidavits were made. They were made in 1923.

Q. And in those affidavits, as I understand it, you did not mention about this wagon train incident at all?

A. I don't think I have.

Q. You didn't mention about his being highly nervous and excited?

A. I probably did not. [146]

Q. And you did not mention about his hands fluttering and his stuttering?

A. Not in the affidavits, I don't think I did.

Q. Those affidavits were made eleven years ago?

A. Yes sir.

Q. Was your recollection better then than it is now?

A. Well, no.

Q. In other words, you recall as vividly in 1934 the experiences that you have related as you did in February of 1923?

A. I didn't get that.

Q. In other words, you recall as vividly in 1934 the experiences that you have related, as you did in February of 1923?

A. Yes.

Q. And you recalled that less clearly in 1923 in February, that occurrence as you recall it now?

A. I wouldn't say that.

(Testimony of John Bollick.)

Q. What has caused your memory to get better as the years run on?

A. It is not any different only at that time I noticed this here but I noticed this other incident at that time when he had that shell blown up. I should have put that in that affidavit, but I did not.

Q. Well, now is the Noble ranch in as good condition now with reference to production, general upkeep and appearance, as it was when you first saw it in 1920?

A. Is it as good?

Q. Yes.

A. No.

Whereupon a recess was had.

After Recess

Q. Now, has Mr. Noble added to his farm holdings down at Grass Range [147] since he came back from the army, to your knowledge?

A. I couldn't say.

Q. But the farm has been operated each year, has it not?

A. Yes, by hired help.

Mr. BALDWIN: I will ask that that be stricken as not responsive.

Q. The question is whether it has been operated, the farm has been operated?

A. Yes.

Q. And he has a nice house on the place?

A. No, I wouldn't say.

(Testimony of John Bollick.)

Q. How about out buildings?

A. He has a good barn.

Q. This land is well cared for?

A. Not in the last ten years I wouldn't say it was.

Q. That is not since 1924?

A. I should say 1920, since 1920 it has not been well cared for.

Q. How was it in 1918?

A. I don't know what it was in 1918.

Q. But you just know that Noble gets the best crops they grow there, but he don't care for the farm?

A. I know they raised a good crop in 1923, weather conditions—

Q. And since then the average crop down there has been six or seven bushels to the acre?

A. Yes sir. I made two affidavits for Mr. Noble. I cannot recall the dates on which I made those. I think it was in the year 1923 I also made one in 1925. I don't think I mentioned the second gassing, and I did not mention this shell occurrence in either one of those affidavits. The first affidavit was made in 1923, but I couldn't tell you what date.

Q. Well, read it, and now tell us what date. [148]

A. On February, the 19th, 1923. I made that affidavit on that day having had my attention called to the one I made in 1925, this was made on June 4 of 1925. I have not made any other affidavits in connection with Carl Noble. Carl Noble was not

(Testimony of John Bollick.)

present when I made those affidavits. I think Mr. Brooman prepared the affidavits at Grass Range. I told him what to put in and he made the affidavits. Then I finally signed them. He put in the things that I told him to put in the affidavits.

Q. I will ask you if it was not a fact that Noble made affidavits for you at the same time that you made these affidavits?

A. I wouldn't say that. I don't know whether he did or not.

Q. The question is whether he was there making affidavits for you at the time you were making affidavits for him?

A. No sir. I know he made an affidavit for me. Not about the same time that these affidavits were made by me for him. He made the affidavit for me when I was in the hospital at Fort Harrison, and sent it to me in 1923.

Redirect Examination by Mr. Molumby:

Q. John, generally since you have been back from the army, what has been your physical condition?

A. My physical condition is poor. I put in about four years in the hospital since the war, and at numerous times I have been in bed at home. I have received medical attention portions of the time since I have been back. As to how recently I have received medical attentions, it was about six weeks ago I had an operation for sinus trouble, and lost my left eye.

(Testimony of John Bollick.)

Recross Examination by Mr. Baldwin:

Noble was not married when I first met him at Grass Range in 1920. He has married since that time. I could not tell you just exactly what year, but I believe in 1924. That is as close as I [149] can get to it, I could not say. I was in the hospital, I think, at the time he was married. I am not certain of the date. If as a matter of fact he was married on April 7, 1928, that does not refresh my memory, I could not say. I know he has married since the war. I think it was probably not earlier than 1924.

Witness excused.

Whereupon,

HARRY HILLSTRAND,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Harry W. Hillstrand. I reside in Great Falls, Montana. I am manager and half owner of the Electric City Printing Company, Great Falls. I was in the army during the world war. I was in the sixtieth infantry, fifth division. I am very well acquainted with Carl Noble. I first met him at Spokane, Washington, Fort Wright. As to the occasion of my meeting him at that time, we were in the barracks at Fort Wright, naturally I was feeling kind of homesick and lonesome, he was

(Testimony of Harry Hillstrand.)

from near Great Falls, from Lewistown, I believe he said he had enlisted at Lewistown both recruits, just been sworn in the army at Fort Wright. Noble and myself were not in the same company; we were in the same division; in the same battalion. I will explain to the jury what a battalion is. A battalion in the infantry is composed of four companies; four companies of infantry; each company of infantry consists of two hundred and fifty men. In addition to these four companies there is attached a wagon train from the supply company which consists of approximately three wagons and drivers for each company, which makes about in the neighborhood of a dozen drivers to each wagon to handle supplies and ammunition. In one of them wagon trains, there is always a supply company, non-commissioned officer; he may be a Corporal or Sergeant, or he might be a first [150] class private. In addition to this, in command of a battalion, there was a Major who had an adjutant, and lieutenant and second lieutenant, and probably a small headquarters staff of ten or fifteen men. I was in Company G, 2nd battalion, 60th infantry. I was not a portion of the wagon train. As to what portion of the battalion Noble was connected with, he was the wagon master, that is the non-commissioned officer in charge of the wagon train in our battalion. As such I got to know him when I was attached to the battalion headquarters, and later I was first sergeant in company G battalion. I got to know him well, having

(Testimony of Harry Hillstrand.)

been with him all the way through. After I was at Spokane, I was sent to Gettysburg, Pennsylvania. We were in Pennsylvania approximately a month, then we went to Camp Green, North Carolina. As to whether I was with Carl all the time, it all depends on what you call with him; he was in the supply company in the same regiment, and being from Montana we struck up a friendship, we always visited back and forth; we were in the same regiment, and not in the same company. He was in E company. Before we went to Camp Green he was transferred to the supply company. After we were at Camp Green we went to Camp Merritt, Long Island. From there we went to Liverpool, England. Carl and myself did not go over in the same boat. As to what, if anything I knew about his physical condition when I first met him over at Spokane, he looked like the rest of us. He was all right; he got in; passed a strict physical examination. I remember him passing the physical examination. As to his appearance at that time, he was older looking than I was; he looked about his age. I know he was bald headed, his hair was not all gone, what he had was kind of a dark brown; he looked to be in good physical condition. He must have been to have gotten in.

Q. What do you know about his physical condition at Camp Green? [151]

A. Well, that is hard to answer. I saw him off and on. I remember he was sick down there. He had been sick at Gettysburg, that is what he told me.

(Testimony of Harry Hillstrand.)

Mr. BALDWIN: We will ask that be stricken as not responsive and hearsay.

The COURT: Yes, sustain the objection.

WITNESS continuing: Subsequent to this occurrence at Camp Green, I next saw him at Vassiro, France. I will describe what his condition was then. He looked bad. He looked sickly. I asked him what was the matter. He said he had the mumps.

Mr. BALDWIN: We object to that self serving.

The COURT: Yes, sustained.

Q. Just describe what you observed as to his condition, and what he said?

A. He looked like he had been sick; he looked pale. After we were at that camp, our division or battalion went up to the Voges sector the proper name for it was Aisne sector, was the name that was given to it on the map, as I remember it. We were on that front approximately two weeks. From there we went back to the training area for a short time around Espinault and St. Mihiel, from there we went back up to the front. That was in the Sandy A sector. That was an area just south of St. Mihiel sector, south of Chateau Thierry. We were under fire in that sector for a period of thirty-nine days. We were in the previous sector the first time we went up approximately two weeks, it may have been ten days or twelve days something like that.

Q. Do you recall anything occurring to Noble in the St. Mihiel sector?

(Testimony of Harry Hillstrand.)

A. You mean the Sandy A sector?

Q. You were there for this period of thirty-nine days?

A. Yes. [152]

Q. Did you later go up to the St. Mihiel sector?

A. Yes.

Q. And for how long a period of time were you up to the St. Mihiel?

A. About ten days.

Q. And do you recall anything occurring to Noble up there?

A. Not any specific incident. I saw him practically every day or other day, or so. I don't recall any specific incident happening to him. From St. Mihiel we went in the training area just behind the sector, behind the front, two miles in front, then we went to the Meuse Argonne. We were in the Argonne for the same length of time we were in the Sandy A, for thirty-nine days under fire. I don't recall anything occurring to Noble up there at that time, not any specific case. I will describe to the jury what his condition was as I saw him while up in the Argonne. His job, of course, was to get the wagons with the supplies to any infantry company. As I remember Noble he was always riding a mule, and he was a man of a highly nervous disposition, that is, he was in the Argonne. He was gradually getting worse. He got the wagons up there. We used to have a saying—

Mr. BALDWIN: We object to what the saying was as hearsay.

(Testimony of Harry Hillstrand.)

The COURT: Yes, sustained.

WITNESS continuing: I will describe how he appeared up there and how he acted. He acted like if it was too much of a nervous strain for him. He was shell shocked in our opinion.

Mr. BALDWIN: I ask that it be stricken, as stating his opinion.

The COURT: Yes, sustain the objection.

Mr. BALDWIN: I will ask that the jury be admonished to disregard it.

The COURT: Yes, you may disregard it.

Q. Harry, did you see many shell shocked men up on the front? [153]

Mr. BALDWIN: We object to that as immaterial.

The COURT: You better qualify him as an expert as to what are the symptoms of shell shock so that he might be able to testify.

Q. Did you see numerous men up at the front which were shell shocked?

Mr. BALDWIN: We object to that as not qualifying him, to show what is shell shocked.

The COURT: We are liable to wade in pretty deep, but you better qualify him.

A. I could talk for an hour on shell shock.

Mr. BALDWIN: So could I, but I don't know anything about it.

Q. Just describe what his condition was, as you saw him?

(Testimony of Harry Hillstrand.)

A. When I saw him he was sitting on that mule. He was always yelling at the men, and spitting all over himself. He would get so excited he was wild. He would curse anybody that would interfere with his work, I presume. I have seen him curse officers, which he could get court martialed for. He was a likable fellow. He would have cursed General Pershing. His main purpose was to get those wagons up there whether it killed him.

Mr. BALDWIN: I move that that be stricken.

The COURT: Yes.

Q. What other physical manifestations did you see, Harry, of his condition at that time?

A. He looked thinner and older. His eyes were staring.

Q. When he was up at the Argonne, what was the color of his hair?

A. It was so dirty we couldn't tell what color a man's hair was. He was practically gray haired then. As to whether it was that way when I first saw him in November, I will say it was a dark brown. He was kind of bald in front. We stayed there on the Argonne until the Armistice, November 11, then we went immediately right up to [154] Germany; followed right behind the Germans. We went as far as Trier. As to what portion of Germany that was in, or what province in Germany, I will say that I don't know enough about Germany to know. It was this side of Coblenz. We went back to Luxemburg. We were stationed at this place that

(Testimony of Harry Hillstrand.)

I mentioned up near Coblenz. We were at that place approximately eight months. The name of this place was Esch. That is a province of Luxemburg. We were not stationed at Trier, just there for a time and come back. We were in several little places in Germany; I just cannot recall their names. While stationed at Esch and Luxemburg, I recall something occurring to Mr. Noble with reference to his physical condition; he had the flu. I don't know for how long a period he had the flu; I imagine a couple of weeks. At that time he was with the supply company. I imagine he was in bed there at Esch.

Mr. BALDWIN: We move that the latter part of the answer be stricken; his imaginations have no place in the record.

The COURT: Yes.

WITNESS continuing: I did not see him in bed. It may have been the 5th or 6th of July that we left Luxemburg. It was right after the 4th of July, I know that. During those periods that we were up on the front, we were always in the front line trenches. As to where Carl was during that period, he was on the supply wagons, which we considered the front line trenches. They were a mile or so back of us, which was just as dangerous as the front part, in fact, more dangerous.

Mr. BALDWIN: I move that be stricken.

The COURT: It may stand. It will not do any harm.

(Testimony of Harry Hillstrand.)

WITNESS continuing: The area in which he was, was always under shell fire, continuously. As to the kind of shell fire, generally these three inch shells, and six inch shells. They were generally [155] more under the shell fire than we were, because back of the lines they always get the heaviest shell fire. They were not susceptible to rifle fire, but were more susceptible to shell fire.

Whereupon the hearing was adjourned until two o'clock P. M.

Tuesday afternoon, October 30, 1934.

Direct Examination Harry W. Hillstrand
continued by Mr. Molumby:

WITNESS continuing: As to the nature of the shells that were being fired on the front that I was on and that Noble was on they consisted practically of every kind of a shell that they had invented during the war, mostly shrapnel and gas. As to how the gas was fired, the gas shells dropped intermittently with a shrapnel shell. You might have a shrapnel shell drop on you one minute, and the next minute a gas shell. They were both fired at the time, as a general rule they were both fired at the same time; the gas shells hit mostly at the supply department and ammunition train. As a rule on the front line where the infantry were, we generally had shrapnel. As to the distinction between the front line and the first line, the front line, the way it was termed in the army, would include an area from the first line directly in front of the enemy

(Testimony of Harry Hillstrand.)

to a base maybe four or five miles back in fact, the front line was directly under fire, and that was under fire, it would not be necessary to be fifty feet from the Germans, or might be ten thousand feet. The danger really was the same. What we termed the first line, there would be a first line and second line and third line; it might be two or three hundred yards apart, and the reserve would be behind that; anything within danger of three inch shells, that is, three or four miles from the front, we always termed the front line. That area would be traversed by the wagons in bringing up supplies. In fact they [156] were always right in that area all the time. They were very seldom out of that area. It is hard to answer where they would have their ammunition dumps and supply dumps. They would have the large trucks to pick them up, within four or five miles to the first line, and these wagons, regiment supply wagons, they would get them and bring them up a little closer, and they would gradually work them up to right where we were right in the first line. These dumps were generally within two or three miles; not any more than that, the regimental dumps.

Q. What do you know about the gas that was in that area at St. Mihiel and the Argonne over which these wagons including Carl Noble's were going?

A. Those areas were always soaked with gas; they were intermittently firing all the time. They

(Testimony of Harry Hillstrand.)

might let up on the gas firing for one day. You may have passed through the valley that had been gassed the day before; you could be gassed two days after the shells had exploded. As to how long the gas would stay on the ground after the shells bursted, that all depended on the weather and where it landed. If it was in the valley, and no wind blowing, it might stay there a couple of days. If it was up on the hill and the wind blowing it wouldn't stay there two minutes. It depends on the climatic conditions. If it was raining it would hang close to the ground, if it was hot, why, it would rise.

Q. Now, Harry, after you left Luxemburg were you and Carl together?

A. Well, we were not together until we got to New York, then we were together from there until we got home. I don't know just where I left him after we left Luxemburg. The entire division left Luxemburg at the same time, within two or three days; some went some place and some went the other. I think the entire [157] division went to Brest. I am positive that Carl and myself came home in the same boat. We were again together in New York. I came out from New York to Fort D. A. Russell with him; that is sat in the same seat with him a good deal of the way. I will describe to the jury what his condition was on that trip from New York to Fort D. A. Russell, but it is kind of hard to describe. It was generally the same as he was in the war in the Argonne. He was nervous

(Testimony of Harry Hillstrand.)

and awfully temperamental, and he stuttered a lot. He was nerve racked; he did not have any nerves. He looked a lot older. In fact we considered him the old man when we came home. He was much more baldheaded. I know that he lost a lot of his hair. When we came to Fort D. A. Russell, I cannot remember distinctly how long we were there before we were discharged, but I think it was about three days. That was the condition he was in when he was discharged. He had not changed much since that St. Mihiel time. After my discharge I saw him once in the last sixteen years, that is, up until now. That was when he was going through here, going to Fort Harrison. I just saw him on the train; just long enough to shake hands with him. I did not see him again until last week; I heard he was in town and in bed so I went up and saw him.

Q. How does his condition as far as nervousness compare now with what it was when he was discharged from the army?

A. Well, he might be a little more nervous. There is not much difference. I would have recognized him without any trouble. He has not changed much as far as nervousness because he always was that way.

Q. What do you mean by always was that way. What period of time do you have in mind?

A. Well, ever since the war, since the St. Mihiel and the Argonne [158] he was in the same condition. He was highly nervous, temperamental. He looked

(Testimony of Harry Hillstrand.)

a little older, but outside of that he looked a little older, but still he looked like an old man then in the Argonne.

Cross Examination by Mr. Brown:

The wagoners were equipped with gas masks at the front lines; the same kind of masks that the men in the trenches had. I stated I first noticed that he had been sick at Camp Green. I didn't see him in the hospital or infirmary at Camp Green. I did not see him in the infirmary in France. I did not see him under the care of any army physician in France. Every time that I saw him in France he was performing his duties as a soldier.

Witness Excused.

Whereupon

A. G. GILLESPIE,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is A. G. Gillespie. I live at Grass Range, Montana. I am acquainted with Carl Noble. I have known his since the fall of 1919. I am engaged in the drug business. I have been in the drug business for over thirty years. I am a pharmacist. I graduated from a duly licensed pharmacist school. That was in 1898. Since that time I have continuously practiced the profession of pharmacist. In the fall of 1919, the circumstances of my meeting

(Testimony of A. G. Gillespie.)

Carl Noble, Mr. Noble came into my drug store; he appeared to be sick; looking very pale and haggard and nervous looking, and asked me for some medicine. I will describe his condition as I saw it at that time. He was very nervous and fidgety, and he stuttered slightly and appeared to have a rather excited look, as I would say, that was from his nervousness. I prescribed for him after I had taken his pulse and temperature. [159] I will describe to the jury the type of pulse he had. I took his pulse and found that his pulse was jumpy and rather throbbing and palpitating, and the temperature——

Mr. BALDWIN: Just a moment. That is not responsive. What was his temperature?

A. His temperature, as I recollect, the first time was about one degree above normal.

Mr. BALDWIN: We will ask that that be stricken as a conclusion.

Q. What is the normal temperature?

A. 98.6/10.

Mr. BALDWIN: We shall object to examining this witness as an expert on diseases. He said he prescribed for him.

The COURT: He has not gone that far yet. I don't suppose he intends to. He seems to be inquiring the line, I expect any pharmacist would be likely to know. He has not asked what disease he had, or what his diagnosis yet.

Mr. BALDWIN: We will ask an exception.

Q. What was the temperature that you found?

A. 99.6/10.

(Testimony of A. G. Gillespie.)

Q. What medicine did he obtain, if any, at that time?

A. I put up some mixture of digitalis. As to what that medicine is used for, that slows and strengthens the beat of the heart. That seemed to correct his trouble at the time. He complained of this terrible nervousness.

Q. Can you describe in more detail his nervous condition as it appeared there to you?

A. Well, he was short of breath and very erratic in his movements in his hands, and stuttered a little and seemed pale and excited looking; his eyes were rather stary. I would judge that he was quite a nervous man, and judging from my observation, why, he [160] was suffering from——

Mr. BALDWIN: Just a moment. We object to this.

The COURT: Yes, sustain the objection.

WITNESS continuing: I saw him frequently after that. He frequently after that got medicine from me.

Q. What was the nature of the medicine that he would get?

A. His shortness of breath seemed was caused by——

Mr. BALDWIN: I object to this as not responsive.

The COURT: Yes.

Q. What was the nature of the medicine that he got?

A. I gave him digitalis; that was to strengthen the beat of the heart. I should say it was probably

(Testimony of A. G. Gillespie.)

eighteen months off and on that I gave him that medicine. As to how frequently he would get it, sometimes he got a small bottle and other times he got a little larger bottle; sometimes one every eight or ten days, sometimes one every three weeks.

Q. After this eighteen months period which you mentioned, did you see him frequently?

A. I saw him frequently, yes, but after I had been putting up this medicine for a while, I advised him to go to a physician.

Mr. BROWN: We ask that also be stricken.

The COURT: I will overrule that objection.

Q. At the time mentioned what was wrong with him, what complaint did he have at that time?

Mr. BALDWIN: We object to that as calling for a conclusion.

The COURT: Yes, sustain the objection.

Q. What physician did you advise him to go to, if you know?

Mr. BALDWIN: I object to that as immaterial.

The COURT: I will overrule the objection.

Mr. BALDWIN: Note an exception. [161]

A. Well, at first I told him to go whichever physician that he had plenty of confidence in. I said, "If you don't know any of them", I said, "perhaps you might make a trip to Great Falls", I said, "there are several good ones up there, who might give you a thorough examination."

Q. Did he go to these physicians?

Mr. BALDWIN: I object to that as immaterial.

(Testimony of A. G. Gillespie.)

The COURT: Sustain the objection. I didn't expect him to make that sort of an answer.

WITNESS continuing: At the time I referred to, there was a lady doctor in Grass Range. As to how frequently I saw Carl Noble after the first occasion on which I met him, it averaged possibly from once a week to once every two or three weeks. I can't fix the date closer than the fall of 1919. I can tell you what month it was, it was in the month of November. I had seen him before that, but he had not done any trading with me, although he was in my drug store. I did know him. I cannot say that I had observed his condition before that, because I was busy at the time, and he was just simply introduced to me.

Q. During those periods of time that you mentioned as having seen him on those various occasions, had his condition been the same or different?

A. His condition had remained very much the same, as I could see I couldn't say that there was any appreciable change either way. That has been true right up to the present time.

Q. What, if anything, did you notice with reference to his nervousness and mental condition as aforesaid?

Mr. BALDWIN: We object to this as calling for an opinion by a witness who is not an expert.

The COURT: Yes. [162]

Mr. MOLUMBY: I wish you would answer with reference to what you saw in reference to his condition.

(Testimony of A. G. Gillespie.)

The COURT: Let him describe what he did.

Q. Describe what you saw with reference to his condition?

A. One thing in particular that I have noticed, and that is the thing that I recall right now, and that was a very peculiar habit he had of expounding on his wonderful farming ability and his system of farming better than anybody else. He could raise better crops, and all that, and I thought——

Mr. BALDWIN: Just a moment. We object to what he thought.

The COURT: Yes, sustain the objection.

Q. What did you notice of that character with reference to other things that he talked about?

A. Well, just seemed to be due to his nervousness, as far as I could tell by looking at him.

No Cross Examination.

Witness Excused.

Whereupon

LOY FRENCH,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Loy French. I live at Grass Range, Montana. I am engaged in the garage business where I have lived since 1914. I know Carl Noble. I have known him since about that time, shortly after I

(Testimony of Loy French.)

came there. I knew him prior to the war. His physical condition at that time seemed to be all right. At that time he was running a farm. I think at that time he was physically able to do all kinds of work on the farm, I believe so. I recall when I first saw Carl Noble. After the war, that was shortly after he returned. I mean by that it was perhaps within a month of his return, after his return. I will state to the jury how he [163] appeared to me when I first saw him after the war. Carl seemed to be quite a changed man when he came back from the war.

Mr. BALDWIN: We will ask that be stricken as not responsive and a conclusion.

The COURT: Yes it is. Just describe his appearance.

A. He seemed very much older. He was very excitable; stuttered a great deal; rather incoherent in his talk; disconnected in his remarks, any contact that I had with him. I recall the circumstances under which I first met him after he came back. I talked to him in the town, right after he came back within a month after he came back. As to the occasion of my conversation then, my wife had a couple of brothers in the army, and we were very anxious,—both of these boys were killed,—and we were very anxious to learn as much detail as possible about the boys.

Mr. BALDWIN: Object to this as immaterial.

(Testimony of Loy French.)

The COURT: Yes, it is immaterial. I suppose that is the occasion of his talking to him the first time.

Q. Mr. French, did talking to Carl in reference to the war have any effect upon him?

Mr. BALDWIN: Object to that as calling for a conclusion.

The COURT: Yes, technically, of course. Sustain the objection.

Q. What effect did talking to Carl concerning matters occurring during the war and overseas have upon him, if anything?

Mr. BALDWIN: We object upon the same ground.

The COURT: Yes, you will reframe your question differently.

Q. Mr. French, just describe his appearance and the demeanor when you were talking to him concerning matters that occurred during the war?

A. Well, it would upset him a great deal. He would become very excited, very upset, and his talk would gradually become incoherent [164] and disconnected. It had that effect upon him. As to how it manifested itself, if at all in a physical way with reference to his action and looks, he would use his hands a great deal; his eyes became wide and stary; he stuttered. As to how frequently I have seen Carl since that time, I have seen him off and on during all of that time. It would be rather hard for me to say definitely. As to approximately how

(Testimony of Loy French.)

frequently I would see him on the average from that time on up to the present, I would say when he was able to be around that I would see him perhaps once a week. I would see him in town usually. As to whether I would see him out on the ranch, at all, I saw him just once or twice that I was out on his ranch.

Q. When in town what was his appearance as compared to what you have already described, in reference to his appearance?

A. I couldn't see much change, unless it would be for the worse.

Mr. BALDWIN: Unless what?

A. Unless he became more excited.

Q. How does he appear now as compared to the way he appeared when you first saw him after the war?

A. Well, I think he is in worse condition than he was. He appeared in worse condition now than he did then; he is more excitable, very much more excitable. It is hard for him to contain himself any length of time. I last saw him day before yesterday. Prior to the time I came up here, I don't think I had seen him for perhaps eighteen months. I know that Carl Noble owns a car. I don't believe he is able to drive a car. I saw him driving the car but a very few times. I recognize his car when I see it. I have seen it in town on different occasions.

Q. Who was driving it on these occasions when you saw it?

(Testimony of Loy French.)

A. His wife mostly. I have never been with him in the car. [165]

Cross Examination by Mr. Brown:

I knew Noble before the war. As to how often I saw him between 1914 and 1917, I would see him perhaps once a week whenever he came to town. I cannot recall that I ever saw him out on his farm. I think I have been on his farm once or twice. He was at that time operating this farm. As to whether he was known as a successful farmer up there in that community, he seemed to be getting along all right. As to whether he was known as a good farmer up there, he was a good farmer. I could not say exactly how much of a farm he was farming at that time, because I never had any occasion to check up on his farming operations. I say that I have seen him in town many times since he came back from the army; quite a number of times. I could not say whether he was in town on his business as a Director of the Elevator Company up there. I do not know only by hearsay that he was one of the Directors of an Elevator Company up there. I learned that from just ordinary rumor. I had no way of knowing whether he was a Director or whether he was not. I believe the ordinary rumor was that he was.

Q. Now, you say you have noticed a marked change in his condition from the time you first saw him in 1919 to the present time?

A. I think he is worse than he was when I first saw him in 1919. I would not say that has been markedly apparent to me. I think it has gradually grown worse during those years.

Witness Excused.

Whereupon

CHARLES MATTSON,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Charles Mattson. I reside at Grass Range. I have lived in Grass Range about thirteen years. I am acquainted with [166] Carl Noble. I first became acquainted with Carl Noble perhaps twelve or thirteen years ago, about 1921 I would say. That is when I first came to reside in Grass Range. I have been engaged in the barbering business in Grass Range. I do recall when I first saw Carl Noble.

Q. Just describe his condition to the jury, as you saw him and first observed him.

Mr. BALDWIN: I object to this as too remote, unless it is checked up and tied in, as he did not see him for two years after the man was out of the army.

The COURT: He can describe his condition. Overrule the objection. Let him describe his condition.

(Testimony of Charles Mattson.)

Mr. BALDWIN: Note an exception.

A. He appeared in rather poor physical condition.

Mr. BROWN: Move to strike that answer.

Q. In what way?

A. He was quite nervous when I noticed him, and excitable on occasions, and he seemed to have some heart trouble or something similar.

Mr. BALDWIN: I will ask that the last part of the answer be stricken as a conclusion.

The COURT: Yes, strike it out.

Mr. BALDWIN: And the jury admonished to disregard it.

The COURT: Yes.

Q. In what way, if at all, did his nervousness manifest itself or show itself to you?

A. Kind of shaking of the hands; just a nervous condition; impediment of speech. He would get rather excited, you know. He came into my shop quite frequently. As to what manifested his physical condition to me when he came into the shop, he was [167] rather a hard customer to work on; he was hard to keep quiet. As to whether I can think of any other incidents that would indicate anything with reference to his physical condition, that showed itself when he was in the shop, he would get quite nervous if anything unusual happened, like the slamming of a door, or something like that; if anyone would get into a discussion with him, I sometimes would have to ask him to keep more quiet until I could finish my work.

(Testimony of Charles Mattson.)

Q. Can you think of any occasions when he was in the shop, and in your chair, that would indicate whether or not he could stay there while you were cutting his hair and shaving him, with reference to his physical condition, aside from what you mentioned?

A. Yes, I have had him in fainting spells. I will describe those to the jury. He would just get pale, his color would get bad; he would get pale, and his heart would seem to pound, and on such occasions he would ask me to bring him a glass of water. In a few minutes he would seem to recover. That happened on more than one occasion in the shop. I would not say it happened frequently, but more than once.

Q. What has his condition comparatively been through the years between the time you first saw him until the present?

Mr. BALDWIN: We object to that as calling for a conclusion.

The COURT: Yes, I think so. Sustain the objection.

Q. Do you see any difference in his appearance from the time you first saw him up until the present time?

A. I think I do.

Q. What is that difference?

Mr. BALDWIN: Object to this as immaterial and too remote; fifteen years after the occurrence.

The COURT: Overrule the objection. [168]

Mr. BALDWIN: Note an exception.

(Testimony of Charles Mattson.)

A. Well, he is much weaker now than he was. He is bedfast.

Q. What if any, difference, have you noticed with reference to his nervous condition over those years?

A. Well, it is quite similar now as to what it was then.

Cross Examination by Mr. Baldwin:

I really believe I did make an affidavit for Mr. Noble. I cannot recall when that affidavit was made.

Q. Well, it was on January or February 17, 1925. Who did you make that affidavit before?

A. I don't believe that I recall who I made it before.

Q. Did you at that time make any statement with reference to a nervous condition in Carl Noble?

A. I really could not say what the affidavit consisted of now.

Q. Well, you told all the facts that you knew to say at that time, did you not?

A. I presume so. I don't know.

Q. Well, that was your purpose, was it not, to tell all you knew about the man when you made that affidavit?

A. I wouldn't say whether it was or was not.

Q. What was your purpose in making the affidavit, if it was not to tell the truth, the whole truth and nothing but the truth?

A. I believe that I told the truth at the time.

Q. Did you make any affidavit reserving anything intentionally?

A. No sir.

(Testimony of Charles Mattson.)

Q. I will ask you if you mentioned anything about his nervous condition when you made that affidavit?

A. I cannot recall. I cannot recall what the affidavit really was at that time. I don't know that I mentioned anything about [169] an excitable condition or not. As to whether I mentioned anything about a weakened condition, I cannot recall what I did mention in that affidavit. As to whether I mentioned anything about his becoming more nervous when anything unusual happened, I would not say what I said in that affidavit. I don't know that I made any mention in that affidavit about his ever having fainted in my chair. I don't know that I made any mention about seeing his heart palpitating at times, and pound.

Q. Well, did you put anything in that affidavit that corresponds with the testimony that you have given here today?

A. I cannot recall just what I did say in that affidavit.

Q. What was the object of your making an affidavit if you didn't tell the facts as to his condition.

Mr. MOLUMBY: No evidence here that he didn't tell the facts.

Mr. BALDWIN: He said he don't recall making these statements. I have covered everything that he has testified to today.

Q. Is there anything that you can recall in the affidavit that corresponds with any statement that you have made today?

A. I don't recall what I put in that affidavit. That has been some time ago.

Q. And about the only talks you ever had with Noble was concerning your condition of health, was it not?

A. His and mine both.

Q. In other words you had a mutual society that swapped notes as to the condition of each other?

A. Yes.

Q. That is about all you talked of?

A. We talked about other things. That was some of the things.

Q. You saw Mr. Noble farming in 1920?

A. Before that time, was that the question?

[170]

Q. You saw Mr. Noble farming in 1920?

A. I didn't see him farming, no sir.

Q. You saw him drive a team and perform labor as late as, I believe in 1921, didn't you?

A. I saw him drive a team, yes sir.

Q. And you saw him doing farm work, or work on the farm as late as July of 1921, did you not?

A. I cannot just recall that date.

Q. Well, you have seen him doing farm labor, haven't you?

A. What do you term farm labor, I suppose.

Q. I am asking what you term farm labor, what do you call farm labor?

A. Any work pertaining to a farm.

Q. And you have seen him do that work as late as 1921, haven't you?

(Testimony of Charles Mattson.)

A. All I ever seen him was drive a team.

Q. And when did you see him drive a team?

A. I don't recall the date. I don't know what he was doing in 1918. I don't know what he was doing in 1919. I don't know what he was doing in 1920. As a matter of fact I had seen him before the latter part of 1921 in Grass Range.

Q. This is October 30th of 1934. You stated on your direct examination that you first saw Grass Range thirteen years ago?

A. No sir.

Q. What was your testimony on that?

A. I lived in the vicinity of Grass Range since 1914. I resided in Grass Range since 1921. I testified in response to the second question on my direct examination that I first met Noble in 1921.

Q. And you saw him doing farm work after you met him?

A. I saw him driving teams and work of that nature.

Redirect Examination by Mr. Molumby: [171]

I saw him driving this team in town; driving the team to town. As to the kind of lay-out he was driving, sometimes he would have a team and buggy sometimes a wagon. I never did see him doing any manual labor. I never saw him doing any labor other than driving in the buggy or wagon. I have seen him in town getting groceries. I never noticed him loading those groceries into the wagon. I really don't know whether I have seen other people loading the groceries in for him or not.

(Testimony of Charles Mattson.)

Recross Examination by Mr. Baldwin:

Q. I am going to show you your affidavit.

A. All right.

Q. To refresh your memory and then I want to ask you whether you stated in that affidavit any of the things that you have stated here, existed. The things you stated here, that he was in poor physical condition; quite nervous; excitable; on occasions his hands were shaking; that he was a hard customer to work on; that he became quite nervous on unusual happenings; that you saw him faint in your chair; sometimes he became faint and asked for water. See if you can find any one of those things in that affidavit.

Mr. MOLUMBY: Before you answer the question, I want an opportunity to object on the ground that the affidavit is the best evidence. If he is going to question it. I can put the affidavit in.

The COURT: The affidavit will be in evidence; undoubtedly will be put in evidence, if he does not, you can.

WITNESS continuing: I do not find anything in that affidavit about his having fainted in the chair. I do not find anything in that affidavit suggesting that he asked for a glass of water because of faintness in my shop, but the fact is he did.

Q. Do you find anything in that affidavit tending to show that you observed any pounding of the heart while he was in your chair being [172] worked on?

A. I believe so. It mentions the heart.

Q. Do you find anything in that affidavit sug-

(Testimony of Charles Mattson.)

gesting that he became quite nervous when anything unusual happened?

A. No sir, I see nothing here in regard to that. I don't see anything in that affidavit suggesting that he was a hard customer to work on. I don't find anything in that affidavit that states he was quite nervous. I don't find anything in that affidavit suggesting that he was shaking on occasion, but he did those things. I don't see that that conflicts. The date of that affidavit is 1925.

Mr. MOLUMBY: We asked that the affidavit concerning which counsel has been interrogating the witness be marked for identification as Plaintiff's Exhibit 1.

Whereupon that affidavit was marked Plaintiff's Exhibit 1 for identification.

Redirect Examination by Mr. Molumby:

Q. I will show you what is marked Plaintiff's Exhibit 1 for the purposes of identification, and ask you if that is the affidavit that counsel on cross examination has been questioning you. Is that the affidavit he has been questioning you about?

A. I would judge so.

Q. Is that the one that he handed to you and asked you to examine.

Mr. BALDWIN: We will admit that it is.

Mr. MOLUMBY: We offer Plaintiff's Exhibit No. 1 in evidence.

Mr. BALDWIN: We object to certain portions of it, as it is clearly evident from the testimony here that they are hearsay.

(Testimony of Charles Mattson.)

Mr. MOLUMBY: I think we are entitled to have the whole portion go in.

Mr. BALDWIN: That is the condition of Carl Noble in 1919, which [173] was two years before this witness ever saw him. He didn't meet him until 1921.

The COURT: I don't see how you now can object to any portion of it going in. You have examined so thoroughly in regard to that affidavit, unless you can show where it can be separated.

Mr. BALDWIN: Probably I can clear the matter. That is the only objection, because he swears he knew the condition of the man two years before he ever saw him.

Mr. MOLUMBY: There is the difficulty of examining a witness concerning something that is not in evidence. Then later he does not like the rest of it. I think where a portion has gone into the examination, the whole thing is entitled to go in.

The COURT: I think I will let it go in without any reservation at all.

Mr. BALDWIN: We will ask an exception.

Whereupon Plaintiff's Exhibit No. 1 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 1

State of Montana,
County of Fergus.—ss.

I, Charles Matson, living in Grass Range, Montana, after being duly sworn, do make the following statements:

(Testimony of Charles Mattson.)

That I have known Carl Noble for many years. I know that he has had heart trouble ever since he was discharged from the army in 1919.

The reason that I know that his heart was in bad shape is that I have been troubled with sickness a great deal myself the last few years, and as usual when two sick persons get together they compare notes. [174]

Mr. Carl Noble was a frequent customer at my barber shop and I had a good chance to exchange views with him regarding our health. I know that he quit using tobacco and advised me to do the same. I also know that he was getting some medicine from the drug store for his heart.

I remember very well that he had a bad spell with his heart in June and July, 1921 and that he was unable to do manual labor after the fall of 1921, although he did drive a team a short while after this time.

He was in my barber shop the day he left for Great Falls, Montana, to have his appendix removed. As I shaved him that day I asked him if he was not afraid to undergo an operation on account of the condition of his heart. He told me he was, but that he would have to risk it anyway.

I know that he went to the hospital in the spring of 1923 and was there for six or seven weeks. He left for the hospital in St. Paul, Minn., in February, 1924 and he is still there.

The reason that I make the above statements is that I am informed that service connection of his disability has been taken away from him because

(Testimony of Charles Mattson.)

of insufficient evidence as to his heart condition prior to the appendicitis operation, and I know that he was troubled with his heart from soon after he was discharged from the army in 1919 until he left for St. Paul, Minn. and because of myself being on the sick list we often talked about his condition and my own.

I have no personal interest in his claim and am in no way related to him.

CHARLES E. MATSON

Subscribed and sworn to before me this 12th day of January, 1925.

TRUE COPY seen by me this [175] 17th day of Feb., 1925.

ANTOINETTE ZIEHER

Notary Public, Minn.

Commission expires April 11, 1930.

GEORGE BRECKINRIDGE

Notary Public, for the State of Montana, Residing at Grass Range.

My Commission expires May 1st, 1925.

Filed March 9, 1925.

Q. The witness states in that affidavit, with reference to his heart condition, explaining why the affidavit was made out, which reads as follows: "The reason that I made the above statement are that I am informed that service connections of his

(Testimony of Charles Mattson.)

insufficient evidence as to his heart condition prior to the appendicitis operation." Those facts are true.

Mr. BALDWIN: We object to that as calling for a conclusion as to whether he himself is telling the truth.

The COURT: Yes, I will sustain the objection. The affidavit speaks for itself without any other statement.

Examination by Mr. Baldwin:

How many is many with you? You say in this affidavit under oath that you have known Carl F. Noble many years. You state here under oath that you did not meet him until 1921. The affidavit is dated in 1925. The question is, how many is many to you?

A. Well, that would be quite a few years.

Q. Well, how many?

A. Thirteen years.

Q. Well, but this affidavit was made on February 17 of 1925, and there you state under oath that "I have known Carl F. Noble for many years." Is that true? Had you known him for many years on the date of the affidavit. Yes or No.

A. It tells how many years I know him.

Q. No, it don't. You say that you met him in 1921. It says that you have known him for many years, with reference to February 22, [176] of 1925. Just read it. That is the first sentence in your affidavit.

A. I read it all right, but then——

(Testimony of Charles Mattson.)

Q. I am just asking you, if you had known Mr. Noble many years at the time you made that affidavit on February 17, 1925?

A. It was not so many, but then it is an acquaintance.

Q. An acquaintance for three years. Is that many years to you?

A. It is to me.

Q. When you made the affidavit you intended that the Government should act on it?

A. I presume so.

Q. And you made it knowing that that statement was not an exact statement of fact, did you not?

A. No.

Q. Well, you had not known Carl Noble to exceed three years at the outside when that affidavit was made. Yes or No.

A. I cannot answer it yes or no.

Q. You say you met him in 1921. The affidavit is in February, 1929. You can subtract?

A. I had known him in a way before that, but not well acquainted with him.

Q. I will ask you why you said on your second examination, on your second question on direct examination that you met him the first time in 1921?

A. To become fairly well acquainted with him, but I had seen him prior to that time.

Q. But you did not know him, did you?

A. I did not say that I was acquainted with him.

Q. And in the affidavit, as well as in the second

(Testimony of Charles Mattson.)

question here today, you said that you had known him after you met him, and [177] became personally acquainted with him in both questions, didn't you?

A. I suppose so.

Q. I am not asking for suppositions. I am asking about the state of your mind. What did you intend when you said you had known him for many years?

A. Well, not many. I don't recall many.

Q. Well, there it is.

A. I see that there all right.

Q. And you also state here, "I know that he has had heart trouble ever since he was discharged from the army." Now, he was discharged from the army on July 30, 1919, and it was at least three years later before you ever met him, was it not?

A. To get well acquainted, yes sir.

Q. Well, to talk to. You never spoke to Carl Noble prior to 1921 did you?

A. I didn't say that I had not.

Q. Well, would you say that you had?

A. No sir, I would not.

Q. Would you say that your testimony is right or wrong when you said you first met him in 1921?

A. To get acquainted with him.

Q. Is that a true statement that you made here on the witness stand, that you first met him in 1921?

A. Yes sir.

Q. Tell me how you knew at the time you made your affidavit as to what his condition was on July 30 of 1919?

(Testimony of Charles Mattson.)

A. I did not know him.

Q. So that at the time you made this affidavit, you made a statement of a fact that you did not know anything about, did [178] you not?

A. No, I knew something in regard to it.

Q. Which of those two answers is right? You said "I did not know anything about it." Now you say you did. Which is right?

A. Both could be right.

Q. Which is right?

A. I say both might be right.

Q. Now, you explain how they both can be right. You did not know and you did?

A. There are some things you do not know about, and some things you do.

Q. Well, how did you know about his condition on July 30, of 1919, when you made this affidavit?

A. Well, I had been told, I presume.

Q. You had been told and you made the statement of fact to be acted on by the Government as true. something that some one else told you. Is that your idea?

A. That is not the way I expected it to be, but in reading this affidavit through, there are some things that I overlooked that is not just clear to me.

Q. You stated a short time ago that you expected the Government to act on this affidavit, as true?

A. I suppose so.

Q. You expected the Government to act on it?

A. I suppose so. It is the truth the way I see it.

(Testimony of Charles Mattson.)

Q. I am asking you what your state of mind was at the time you signed the affidavit. Did you expect the Government to act on it?

A. Yes.

Mr. MOLUMBY: The affidavit shows its purpose.

Q. You were trying to help Carl Noble get some money from the [179] Government?

A. I just wanted——

Q. Answer yes or no. You were trying to get Carl Noble,—to help Carl Noble to get some money from the Government when you made that affidavit?

A. Yes.

Q. When you came here as a witness, you are going to continue to try to help Carl Noble to get money from the Government?

A. Yes.

Q. Your purpose now is the same as it was in 1925?

A. Sure, I am trying to help him.

Q. Sure, you are trying to help him and now do you know that he was ever in a hospital in Great Falls. Did you ever see him in one?

A. I didn't see him in a hospital. I never saw him in a hospital in Great Falls or Minneapolis. I never saw him in a hospital in Helena. I never saw him in a hospital anywhere.

Q. Then why did you state in this affidavit that he was in a hospital? How did you know that?

A. The record would show it.

Q. How do you know?

A. I was told by different parties.

(Testimony of Charles Mattson.)

Q. And you made an affidavit to be acted upon by the Government upon things that other people told you?

A. They were true.

Q. And you made an affidavit to be acted upon by the Government and about which you personally knew nothing. Isn't that true?

A. I couldn't say I didn't know nothing.

Q. You did not have any personal knowledge as to whether he was ever in a hospital? [180]

A. I didn't see him there. I didn't see him go in or come out of a hospital. Whatever I knew about his being in a hospital was merely based on something that some one else told me.

Q. You stated here: "I know that he went in the hospital in the spring of 1923 and was there for six or seven weeks." You did not know anything of the kind, did you? You don't know it now?

A. He went all right.

Q. I am asking you if you know?

A. I didn't see him.

Q. That does not answer the question. Did you know it then, or not, at the time you signed this affidavit, or while you were on the stand today?

A. He surely went to the hospital.

Q. You know that because somebody told you, but the question is do you know it is true?

A. Well, I didn't see him go to the hospital, but I am sure that he was there.

Q. You don't know it, do you? You are simply basing your idea on some one else's testimony.

(Testimony of Charles Mattson.)

Mr. MOLUMBY: I don't see why he should ask these questions.

The COURT: He has a right to interrogate the witness.

Q. You say: "I know that he went to the hospital in the spring of 1923." Did you know that at the time when you made the affidavit?

A. I surely knew.

Q. How did you know it?

A. Because he told me he was going.

Q. You did not state that Carl Noble told you that he was going to the hospital in 1923, in this affidavit. You state under oath [181] that you know he went there. Why didn't you state the fact as it was when you made this affidavit?

A. I stated facts as I thought I knew them. I am fifty years old. I know that people are not supposed to make affidavits or testify excepting to things they know of their own knowledge. I have known that ever since I was a boy.

Q. Then why did you say in this affidavit instead of: "I know that he went to the hospital" that "Carl Noble told me he was going to a hospital"?

A. I did not suppose that I had to go with him to state that. I knew he was there. It is one of those common knowledge matters that he was there, and the record shows that he was.

Mr. BALDWIN: I ask that that part be stricken; the record showed that he was.

Q. Have you ever seen a record of this hospitalization?

A. No, but you can get them.

(Testimony of Charles Mattson.)

Q. Just how far will you go in testifying? You say you know the record shows it, and you never saw the record, so how can you tell us what the record shows. What do you know about that? Just tell me how you know what the record shows.

A. I don't know that.

Q. And then you say that: "He was in the hospital in St. Paul."

A. I didn't see him there.

Q. The question is, do you know that he was in the hospital in St. Paul? There is a difference between knowledge and belief. I believe you live in Grass Range, but I don't know.

A. If I have to see him there to say that I know that he was there I wouldn't say that I saw him; that he was there.

Q. You cannot say of your knowledge that any statement in that affidavit is true, can you? [182]

A. It is true in my mind.

Q. I am asking you if it is true according to the fact. Is there any statement contained in that affidavit that is true of your own knowledge?

A. If I had to be present to see those things, I could not say that it was.

Redirect Examination by Mr. Molumby:

Q. You know a lot of people that you have not met. Are there people that you know that you have not met?

A. Yes sir. That was the case with Carl Noble before I met him. I lived in that neighborhood and

(Testimony of Charles Mattson.)

I saw him. I knew who he was and just about where he lived. That was true before I actually met him.

Q. You know Mr. Baldwin here, do you not. You know who he is, don't you?

A. Yes.

Q. You never met him, did you?

A. No.

Witness excused.

Whereupon

FORBES WISEMAN,

a witness called and sworn on behalf of the Plaintiff, testified as follows, to-wit:

Direct Examination by Mr. Molunby:

My name is Forbes Wiseman, I reside in Grass Range. I have lived in Grass Range since 1910. My business in Grass Range is that of a blacksmith. I am acquainted with Carl Noble. I have known him since 1910. Prior to the time that Carl went into the army his physical condition was good; he was a good healthy farmer. From what I saw of him he was able to do any kind of work before he went. I saw Carl again after he came back from the army, I think it was about the time he first came back that [183] I saw him, the first day he came back; it might have been the day after he came back. I will describe to the jury his physical condition as I saw it when he first came back, I thought he was quite a changed man; he looked old.

(Testimony of Forbes Wiseman.)

Mr. BALDWIN: We will ask that that be stricken: "He was quite a changed man" as not responsive.

The COURT: Yes. .

Q. In what respect was he changed?

A. His hair was grey and he was,—he just looked like a sick man to me. He didn't look right; quite a change in him. It showed itself to me because he was nervous and stuttered and talked with his hands, would wave around; and did not seem natural to me. He was not that way before he went into the army. As to what else I noticed about his looks, he was thin in the face; he did not look so strong as he did when he left for the army. As to how frequently I saw Carl after he came back from the army, probably not so very often, maybe two or three times, he would come down town and visit with me once in a while. I wouldn't say how many times.

Q. On the average how many times during a year would you see him since then, have you seen him?

A. Oh, probably once a week or once in two weeks, I would not say.

Q. What is his physical condition, as you see it on the other occasions that you saw him after this first time?

A. Well, just about the same. I didn't see no improvement in him I have been out to his ranch, since he came back I have been out there probably three times or four times, I don't know.

(Testimony of Forbes Wiseman.)

Cross Examination by Mr. Brown:

I say that I have known Noble since 1910. He followed the [184] occupation before he went into the army. I know where his farm is located. That is the same farm that he was on after he came from the army. Before he went in the army he was known up there as a successful farmer, good farmer. He was a good farmer. I don't know that he has been a good farmer since he came back. I have not seen him farming himself since he came back from the army. As to what I mean by saying I have not seen him farm, I will say that every time I would go up there, he was always around the house on the farm there. That has been true since he came back from the army, every time that I was up there. I was up there three or four times probably. I could not tell you how soon after he came back from the army that I did go up there. I was up there right after he came back from the army, it might have been a week, or a month; it might have been longer than that I don't remember. I was up there about three or four times, probably, more or less, I don't remember. I saw him in town often. He used to come down to visit with me generally when he came in; he was in my place of business a number of times. I don't know that his position up there as a Director in an elevator company brings him into town often. I don't know that he was a director in an elevator company. I believe I did make an affidavit as to

(Testimony of Forbes Wiseman.)

Noble's condition, and sent it into the Veterans Bureau. That is my signature on there. This affidavit was made on the 13th of September, 1924; that is correct, it must be. At that time, when I made this affidavit, his hair was grey. In 1924, it must have been after he came back from the army; right after he came back from the army. When he came back from the army his appearance was as I have testified today from the witness stand.

Q. Now, will you read that over, your affidavit, and see if you said anything in that affidavit about his hair being grey, or if [185] you said anything in that affidavit about those things that you have mentioned as to his condition from the witness stand today?

A. You want me to mention some of them?

Q. No, I just want you to say whether or not you said in that affidavit that his hair was grey. Do you say anything in there about his hair being grey?

A. Not a thing.

Q. Do you say anything in that affidavit about stuttering?

A. Not a thing.

Q. Do you say anything in that affidavit about his hands waving around?

A. Not a thing.

Q. Do you say anything in that affidavit about

(Testimony of Forbes Wiseman.)

his being nervous?

A. I believe I did.

Q. Read it over again and see.

A. He was very nervous.

Q. And of all the things that you mentioned today, the only thing that you mentioned in that affidavit was that he was nervous. Is that true?

A. Yes.

Redirect Examination by Mr. Molumby:

Q. I will show you what I have had marked Plaintiff's Exhibit 2 and ask you if that is the affidavit that Counsel has been talking about?

A. Yes sir.

Mr. MOLUMBY: We offer Plaintiff's Exhibit 2 in evidence.

Mr. BROWN: We object to it as incompetent, irrelevant, and immaterial, the exhibits being used by the Defendant on Cross examination simply for the purpose of refreshing witness's memory, not for the purpose of proving any fact therein contained. [186]

The COURT: You used this to suit your purpose, and we will let it go in evidence for what it is worth.

Mr. BROWN: Note an exception.

Whereupon Plaintiff's Exhibit No. 2 was received in evidence and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 2.

State of Montana,
County of Fergus—ss.

I, Forbes Wiseman, being first duly sworn state: That I started a blacksmith shop in Grass Range, Montana in 1910, and that I have known Carl F. Noble ever since I have been here. Before enlisting in the army Carl F. Noble was one of the hardest working men I ever knew. After his return in the fall of 1919 I know that he was unable to do anywhere near as much farming as he did before the war. When I asked him what was the matter he told me that he would get tired and short of breath on very little exertion, and that he had a pain in his left chest. I know that he stopped using tobacco thinking that it might help him. I know that he has been unable to do any work at all since the spring of 1922, and that several months before this all he was able to do was drive a team as his heart was a great deal worse whenever he tried to do manual labor. Carl F. Noble has had to hire all his farm work done since this time (Spring, 1922). He was very nervous if there was the least bit of excitement and would complain a great deal about pains in his left chest. About this time I disposed of my blacksmith shop and bought a pool hall. Carl F. Noble would often stop in my place and while I never knew him to play pool he would quite often play a game or so of cards. Sometimes he would have to

(Testimony of Forbes Wiseman.)

stop right in the middle of a game on account of his heart—he would grasp [187] his throat and go outside for air. He has had to take medicine and go and see doctors off and on ever since he has been out of the army. He was in a hospital in Great Falls, Montana in the summer of 1922 for appendicitis, and the government hospital at Helena in the spring of 1923, for his heart. After he left the government hospital at Helena he had to stay several weeks in a hotel at Grass Range before he was able to go out on his farm. In February he was sent to St. Paul, Minnesota to the government hospital.

I have no personal interest in Carl F. Noble's claim for compensation and am not related to him. If he is in need of any more evidence it can be secured from any one in this community as every one here knows him, and knows that he has been unable to carry on his work because of his heart condition.

FORBES WISEMAN.

Subscribed and sworn to before me this 13th day of Sept., 1924.

(Notarial Seal)

R. B. VOOMAN,

Notary Public, for the State of Montana, residing
at Grass Range, Montana.

My commission expires 5-3-27.

Filed: October 16, 1924.

(Testimony of Forbes Wiseman.)

Recross Examination by Mr. Brown:

Q. Did you say, Mr. Wiseman, that you only had been out to his ranch three or four times since he got back from the army?

A. Since he got back from the army; might be more or less; three or four times. I think now it was three or four times. I said that every time I went out there I found him around the house. He was not working.

Q. Well then, Mr. Wiseman, when you told the government in this [188] affidavit that after his return in the fall of 1919: "I know that he was unable to do anywhere near as much farming as he did before the war", how did you know that he had been doing any farming?

A. I know he didn't do it. I know he told me he was not working. He was not working when I went up around there.

Q. You say here in this affidavit that he was doing farming, and you say that he could not do as much as he did before the war. What did you base that upon?

A. He was farming, but he was doing it with hired help. Any time I was there he had hired help to do it.

Q. You say here, after his return in the fall of 1919, "I knew that he was unable to do anywhere near as much farming as he did before the war." You did not put in there what farming he was doing?

(Testimony of Forbes Wiseman.)

A. With hired help?

Q. He was doing it with hired help?

A. What I said is in that paper. He started farming right after he came back with hired help. I am sure of that. As to whether I am just as sure of that as I am of the rest of my testimony in this case, I may be off a year or two. Wait a minute. It is a long time to remember back for me. His brother was with him, his brother Ferd Noble was there then. I never knew him to do any work after he came back from the army. Not what I call labor. There is lots of different farm work. I did not know him to do any farm work after he came back from the army, I didn't see him doing any.

Q. What is the fact as you know it to be, whether he did or did not do any farm work after he came back from the army?

A. He might have. I never saw him. [189]

Q. Did you know on the 13th of September, 1924, whether he ever done any farm work since he came back from the army?

A. I never seen him. I never saw that at all.

Q. What did you mean when you said in this affidavit: "I know he has been unable to do any work at all since the spring of 1922."

A. That must have been when he came back from the army.

Q. What did you mean by that. You say here: "I know that he has been unable to do any work at all since the spring of 1922."

(Testimony of Forbes Wiseman.)

A. That must have been when he came back from the army, I suppose. I don't remember.

Q. What did you mean by that answer that you gave?

A. I never see him doing any work when I was around there.

Q. Why didn't you say that in the affidavit? You say that you know that he has not been able to do any work since 1922?

A. Probably that word "knew" might be a bad word in there.

Q. I believe it is.

A. He might have done it while I was not there. In here, that up until the year 1922 that he could work, and after that he couldn't work?

A. Not to my knowledge.

Q. Now, you don't know what you meant by that, is that true?

A. Yes, I do. I know what I meant.

Q. Tell me what you meant,

A. That as far as I seen him, he was never able to work, my judgment of the man. I have seen him come to town driving a horse. I have seen him drive a team, I saw him come to town with a wagon.

Q. Now, you say here he was in the hospital in Great Falls, Montana, in the summer of 1922."

A. That must be right. I did not see him in the hospital here. I did not see him here. [190]

Q. You said that he was here for appendicitis?

A. That is what he said he was here for. I didn't see him. I did not come up here to see him.

(Testimony of Forbes Wiseman.)

Q. You said in this affidavit he was here?

A. He must have been.

Q. Didn't you say he told you that he was here?

A. I didn't say that.

Q. "In the governmental hospital at Helena in the spring of 1923 for his heart." Do you know whether he was in the Government hospital?

A. No.

Q. Did you see him?

A. No, I knew he was supposed to go there. He told me himself, and neighbors that he was going over there.

Q. And he told you he was going to Great Falls. Is that true?

A. It must be.

Q. You were swearing to this affidavit before the Government, to something he told you, and you did not know anything about it of your own knowledge. Is that true?

A. I knew that he was here. I know this is Tuesday. I know he came over to Great Falls to the hospital. The neighbors had seen him and knew he was here. I don't remember that I saw him get on the train. I said I did not see him in Great Falls. I said the reason that I knew he was here was because he told me that he was here.

Q. You were willing to swear in this affidavit to something he told you?

A. I knew he was over here.

(Testimony of Forbes Wiseman.)

Q. Answer my question. I say you were willing to swear in this affidavit to something you didn't know of your own knowledge, [191] only what Noble told you. Is that true?

A. Must be.

Witness Excused.

Whereupon

MRS. CARL NOBLE,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Mrs. Carl Noble. I am the wife of the Plaintiff in this action. I live at Grass Range. I have a family, I have two children, as the issue of the marriage between Carl and myself. I first met Carl in the Aberdeen hospital in St. Paul, I think it was 1924. I know he was in the hospital. I saw him there. He was in room 24 in the medical ward. As to whether I know how long he was in the hospital at that time, he was there nine months or a year. I think he was in bed nine months while I was there. I am employed at that hospital. I was a United States Veterans Bureau Nurse in the Veterans Hospital. I will describe his condition as it appeared to me at that time. Carl was very nervous, that is one thing. He could not be in a ward where there were a lot of other patients. First

(Testimony of Mrs. Carl Noble.)

he was in a two bed ward. We didn't have any single bed wards except for——

Mr. BALDWIN: I will object to this as not responsive.

The COURT: It is describing his condition.

A. He was there for heart condition. He was in with another heart patient who was very ill at times.

Mr. BALDWIN: We will ask that that be stricken as not responsive.

Mr. MOLUMBY: The latter part is not.

The COURT: It is not responsive. It may be stricken.

WITNESS continuing: They later moved him into a new ward; they had to move him out; made him nervous, this other man. As to how his nervousness manifested itself at that time, he could not [192] sleep; his hands shook; eyes were staring, excited, could not stand this one and that one; he could not stand certain patients that would come into the room; we had to keep them out; they would get on his nerves. As a nurse I was taking care of him part of the time. I remember taking hold of his hand; it was the softest hand I ever held at that time. That was his condition all of the time during his hospitalization there; he was in bed most of the time. After he was in the hospital at Aberdeen, I again met him; he came back to see me the year before we were married. That was in 1927, that is, the fall before. His condition at that time was about the same; he was very nervous.

(Testimony of Mrs. Carl Noble.)

Q. What did you notice when you first saw him back there in the Aberdeen hospital, concerning his condition other than his nervousness?

Mr. BALDWIN: We object to this. If he is calling for a medical opinion from a nurse not qualified.

A. Well, his color, of course, was awful white, and his eyes were poppy. I noticed something else with reference to his condition at that time, and his appearances; he was on a special diet. I know that he was hospitalized at that time for his heart condition and nervousness. His color at that time was yellow white, I would call it. When he came back to call on me in 1927, the things that I have recalled concerning his condition at the time he was hospitalized there still existed. I again saw him before we were married; he came back over there in the spring. We were married that spring. He was still in the same condition. Since then I have resided all the time at Grass Range. I have lived out there on the ranch. Carl has not done any work on the ranch since I have been out there. As to whether he has done any work of any kind since I first knew him, he [193] would try to put up a shelf in the house, and he would have to call on the hired man to finish it. As to what his physical condition has been during the time since we have been married: He has been very nervous. He has not been able to sleep; he has had very bad nightmares; he yells and screams. I have to waken him to get him

(Testimony of Mrs. Carl Noble.)

over it. As to how it manifests itself in the day-time, he cannot stand it any more, and goes and throws himself down on the couch and says: "I cannot stand it." As to what he is referring to, if he tries to do something that does not work, he just gets disgusted. As to whether his nervous condition manifests itself in any other way, we cannot have a radio; we tried a new radio out, but the noise was too much. He cannot drive a car. I drive the car. As to whether he ever attempts to drive it at all, he tries to; he gets nervous when I drive, or he used to, we had to quit driving the car. We had to quit driving the car because it got on his nerves.

Cross Examination by Mr. Baldwin:

As to how long I had been practicing as a nurse when I first met Carl Noble, I did nursing in 1919. I graduated in 1918. I graduated from the Augustine Hospital at Chicago. I had three years of training prior to graduation; that was the required course. I took the necessary graduation and received the necessary certificate. That was in 1918. I first met Carl Noble in 1924. I had been practicing my profession from my graduation and certification in 1918 until the time I met him, that is, off and on. As to how much experience as a nurse I had during that six year period I had been working all the time. I don't know just what you want to know.

Q. I just want you to tell what the truth is concerning the question I asked. How much nursing

(Testimony of Mrs. Carl Noble.)

you had done between the time [194] of graduation and certification until the time you met Carl Noble in 1924?

A. I was not nursing all the time, but I had different work, and there would be a week or two or a month between times when I was not. In other words I had been practicing my profession constantly during that six year period except for a month or two in between different work. During those years I did work as a nurse. I did private duty, as we call it, in the Augustine Hospital; private duty means taking care of special cases.

Q. In other words you were not employed as a general nurse, but as a private nurse, had private patients to care for?

A. That was for a time. Then I did general duty nurse. I did general nursing at the university hospital in Minnesota. I think that was about six months. Then I did Red Cross work. I was instructor of nurses for the Red Cross. I did home hygiene and caring of the sick. I don't know how long I continued that work. I think that was two years but I don't remember. As to where I went then, I was in the same line of work. I did county nursing for the Red Cross. It would be on the same order only I went from school to school. Before this I had women and instructed them in it. In other words I was an instructor in nursing. When I graduated as nurse I was twenty-three or twenty-four years old I guess; twenty-four I believe.

(Testimony of Mrs. Carl Noble.)

Q. And you met Noble in 1924? Had been graduated six years; had six years' experience as a nurse and were thirty years old?

A. I don't know how old I was then. I had not thought of it.

Q. I am asking you. That is a fact, is it not?

A. I had been nursing up to then. I don't remember my age at that time. I did not say I was eighteen years of age when I graduated; I graduated in 1918. I was twenty-three or twenty- [195] four years of age, and I had six years of practical experience at the time I met him. That was in 1923 or 1924. I am not sure whether it was 1923 or 1924. I think it was 1924.

Q. Your statement was that you met him in September of 1924 for the first time at the Aberdeen Hospital.

A. I didn't say September.

Q. All right, give us your best recollection.

A. I didn't say September because I don't remember that.

Q. All right, give me your recollection.

A. It was in 1924, I think, let's see. I have to stop to think; it was 1924.

Q. And you say he remained under your care as a nurse for approximately nine months?

A. Not all the time. I was in the hospital, but they shifted us around. We are not on the same ward all the time. I was there a good deal of the

(Testimony of Mrs. Carl Noble.)

time. I knew that he was there at that time, and I waited upon him during a part of the time.

Q. And became infatuated with him, or got in love with him, I suppose. Is that true?

A. Do I have to answer that question?

Q. I want to find out about these things?

A. Why do we marry, as a rule?

Q. I was wondering how long the courtship had been carried on?

A. It would have been that length of time, would it not?

Q. You say you were married in 1927?

Mr. MOLUMBY: 1928, she said.

Q. Now, at the time you were nursing Carl Noble, you knew all the facts of life?

A. Nobody knows all the facts of life.

Q. But you knew most of them from the physical standpoint, the [196] standpoint of health, and the need of it, and the marriage relationship, you understood perfectly?

A. I wouldn't say that. I don't think that anybody—

Q. You understood them as well as the average graduate nurse with six years of experience in nursing?

A. Yes, indeed.

Q. And certainly you would not have made love to, or allowed a soldier, or anybody else that was not in reasonable physical condition for marriage to make love to you?

(Testimony of Mrs. Carl Noble.)

A. I don't know about that. As a nurse we learn to see further than the physical; we see something beyond.

Q. I suppose all of us see something beyond the physical in courtship, and love, that is natural, but you knew that Carl Noble was not in a fit state for marriage, did you not, because of his health?

A. I wouldn't say that.

Q. When you were nursing him during that nine months' period, he was in a hospital, and you nursed him part of the time and you considered him fit for marriage.

A. Well, I was not thinking about marriage then. I was taking care of Carl. I would say that at that time he was wholly unfit to do any work of any kind, he certainly was; that is while he was in the hospital. When he left it I would say he was wholly unfit to do any work of any kind. As to how long I thought that condition was going to continue, I did think there would be much change in him. I did correspond with him during the four year period between that and the marriage. I did not see him during that period.

Q. And you married him in 1928?

A. Yes, I saw him in 1927. He came back in 1927. [197]

Q. Did you consider him at that time in a fit physical mental and nervous condition, to assume the marriage responsibilities?

A. When it comes to marriage—

(Testimony of Mrs. Carl Noble.)

Q. I am asking you a question. I would like to have you answer that question. Did you consider him at that time in a fit physical mental and nervous condition to assume the marriage responsibilities?

A. I married him.

Q. Well, I am asking you as to your opinion as to his condition at that time. You qualified as an experienced nurse?

A. I didn't form an opinion on that score, perhaps. My age in 1927 was thirty-three. At that time I had had eight years of practical experience as a nurse in hospitals and in private employment, and I did not stop to consider the physical mental or nervous state of the man that I was expecting to marry. That is true.

Q. As a part of your training as a nurse before graduation, and a part of your experience in the hospitals, and in nursing, you knew that even if men were not physically mentally and nervously fit, that they were risks in marriage.

A. Any man is a risk in marriage.

Q. Yes, I think that is true, but if the physical, mental and nervous state is below normal, he is apt to be a greater risk?

A. He has character. That is more than some men have.

Q. I am not asking you about that. I don't care to argue with you. Now, I want an answer to the question that I asked you?

(Testimony of Mrs. Carl Noble.)

A. Yes, yes. At the time I contracted the marriage with Carl Noble I expected to bring children into the world.

Q. Did you learn as a part of your instructions by graduating as a nurse, and also from your experience in nursing, during that [198] period that a man, who was below par, normal, would be an improper father, or would be apt to be?

A. He would be apt to be, I suppose. That is possible, yes.

Q. There was more probability of that result in a man below normal mentally, than there would be in the average man?

A. I don't know.

Q. That was your opinion, was it not, from reading and studying and observation. I suppose you studied eugenics during your course?

A. Yes. Eugenics taught me that a man below normal was not apt to be a fit husband or father.

Q. And studying eugenics, and other subjects allied nursing, and things of that kind, taught you, did it not, that a man whose nerves had been shattered was apt to be an improper father?

A. No sir, not improper; indeed not.

The COURT: I think you have carried this examination far enough. This woman said, she didn't take those things into account in the marriage relation, or getting married. I will stop it right here.

Mr. BALDWIN: Exception noted.

(Testimony of Mrs. Carl Noble.)

The COURT: You have gone far enough.

Mr. BALDWIN: I will save an exception, and prepare an offer of proof.

The COURT: Anything further from this witness?

Mr. BALDWIN: I wish to make an offer of proof.

The COURT: You can make an offer of proof in the absence of the jury.

Mr. BALDWIN: I was trying to follow the rule, which requires that I put it in writing.

The COURT: All right.

Mr. BALDWIN: Mark this offer of proof, Defendant's offer of proof No. 1. [199]

Whereupon said offer was marked "Defendant's offer of proof No. 1".

Mr. BALDWIN: Defendant now offers to prove the facts as stated in Defendant's offer of proof No. 1, by the witness on the stand.

Mr. MOLUMBY: We wish to object on the ground that the line of inquiry does not tend to prove that offer of proof.

The COURT: I will permit you to ask that question, certainly.

Q. At the time you married Mr. Noble, did you consider him below normal mentally?

A. That is a hard question to answer.

Q. It can be answered. You know what your mind was at that time.

A. Below normal mentally?

(Testimony of Mrs. Carl Noble.)

Q. Yes, less the average mentality.

A. Why no, I wouldn't say that. I did consider him below a general average, or below normal nervously.

Q. To what extent?

A. I don't know that you could put that out in degrees, or extent.

Q. It must have some division in degrees, or some way of expressing it, cannot you answer the question?

A. Not that kind of a question, no. I don't know what you mean. I considered him below normal physically, that is below the average. As to what extent, I knew that he was a nervous case and also a heart case.

Q. Well, the question is to what extent did you think he was below the normal, nervously?

A. I don't know how to answer that.

Q. I cannot put the answer in your mouth. It is your testimony. What was your feeling. That is all I can ask?

A. There is not much. [200]

Q. Under what degree did you believe that he was under normal at the time of marriage?

A. He was nervous.

Q. To what degree under normal?

A. I never classified him in degrees. I don't know what I would say.

Q. At the time you married him, he was a strong well nourished man was he not?

A. What is that?

(Testimony of Mrs. Carl Noble.)

Q. He was a well nourished man at the time you married him?

A. Well nourished,—I wouldn't say that, no sir.

Q. Will you just tell me how he appeared to you. Normal or abnormal, or under normal?

A. Under normal.

Q. Physically.

A. Under normal physically at the time, yes sir.

Q. At that time I take it you did not have independent means to provide for you and he?

A. Well, I was not destitute by any means.

Q. You were not rich enough to provide a home for him and you what I am trying to get at. Did you believe at that time that he would be wholly unable to make a living for you?

A. I didn't count on that. I did not figure on that. I knew I could work.

Q. Well, you have not had to work since you married him, that is except in the home. I understand that the mother and wife always works longer hours than we men do. Outside of the home you didn't work?

A. No sir.

Q. Outside of that Carl Noble has provided you and the children [201] with a home and the necessities of life?

A. I had a little legacy come in; that is my folks had some and I have been getting some every year. We borrowed off of my insurance and things like that.

(Testimony of Mrs. Carl Noble.)

Q. At the time you married him you did not think that he was wholly unable to carry on any gainful employment?

A. I told you I had not counted on that.

The COURT: I will object to this myself, if counsel don't. She has answered that question two or three times now. She said she didn't have those things in mind when she got married.

Q. Did you expect at that time that his condition was such that he would be always unable to carry on any gainful employment during the rest of his life?

A. It was possible. As I say—I was not——

Q. That does not answer the question.

A. Oh yes.

Q. And you thought that when you married him?

A. Yes I knew that.

Q. How had he earned a living for you and himself?

A. He has been drawing compensation, and, as I said, we borrowed all we could.

Q. You borrowed for the purpose of buying more land, didn't you?

A. Oh my no; we have not bought any land since. I should say not. He has not increased the land that he owned. We just existed.

Q. That is the way with all of us. Did he make any profit on the farm?

A. There has not been any while I was there, no, and all the machinery is worn out, and every-

(Testimony of Mrs. Carl Noble.)

thing, we have not been able to replace. We have not put any mortgage on the land. We have not [202] put any mortgage on the 45 head of cattle that are on the land. We have had a crop on that land each year, but we have had to hire it put in. We have had a small crop each year. We did not sell it each year, we fed it up to the cows, and to the cattle. You said 45 head, we have not had that many all the time. There was not a very great profit from that. We have not been able to pay the taxes on what we get from the land. As to how many acres each year have been planted and harvested on that farm, each year that is going to be hard for me to tell. I can tell more about how much we have gotten off from it.

Q. Have you any definite recollection as to how much they got off the farm every year since your marriage?

A. Yes, last year we got,—that is, how many bushels do you mean?

Q. I don't know whether you figure it in tons or bushels, or dollars.

A. There has been no profit. We have had to borrow to the limit, but last year I think we threshed 537 bushels of wheat. I don't know what the yield was in 1928. One year we had 230 bushels, we threshed 230 bushels. That was 1931, I believe.

Q. Can you tell me how many cattle were sold off the ranch in any year?

A. In each year, or any year?

A. Oh, the average of two or three years; young stuff.

Q. Can you tell me how much money Mr. Noble deposited in the bank in any year since your marriage?

Mr. MOLUMBY: We object to that as not proper cross examination.

The COURT: I think so. Sustain the objection.

Mr. BALDWIN: Note an exception.

Witness excused.

Whereupon

FERD NOBLE,

a witness called and sworn on behalf of [203] the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

My name is Ferd Noble. I am a brother of Carl Noble, the Plaintiff in this case. I live at Grass Range. I have lived down there for seventeen years. When Carl went away to the army his physical condition was good. Carl at that time was living at Grass Range. We were living together, Carl and myself; running a ranch together down there. Carl was able to do any and all kinds of work on the ranch. He was as good a hand as I was. After he came back from the army, his physical condition was such that he was nervous; he looked peaked. One thing I noticed most was the condition of his hair. When he left, as far as I know, he didn't have

(Testimony of Ferd Noble.)

a grey hair in his head but when he came back his hair was white. As to what else I noticed with reference to his nervous condition, he looked kind of worn out; he was nervous and looked peaked. As to how he showed this nervousness he talked and kind of stuttered, and he could not hold his hands still. He did not stutter before he went to the army. When he first came back he went home, to this same ranch that we occupied before the war. As to whether he did any work there when he came home, that fall I had the place, we were harvesting, and I finished up the harvesting, and I had another man there. He did no work towards that harvesting at all. That was in the fall of 1919. That winter there was very little work to be done on the ranch. We had very few cattle; there was a few cattle; they were running on the straw piles. I was living in the same house with Carl that winter; we lived together that winter, most of the winter. I went out and worked out some that winter. There was practically no work to be done on the ranch during that winter. In the spring of 1920 I put in the crop that spring. [204]

Q. How big a crop did you put in?

A. We put in a pretty good crop in 1920.

Mr. BALDWIN: We object to that as uncertain, and ask that it be stricken.

The COURT: Yes.

Q. How many acres?

(Testimony of Ferd Noble.)

A. Well, we put in between two hundred and three hundred acres. I cannot say for sure.

Q. Did you put in the crop alone, or did you have help, in 1920?

A. I done practically all the heavy work.

Q. Did Carl do any of the work?

A. He was around some.

Q. Was he able to do any plowing and disking?

A. He drove the team some.

Q. And how did that affect him, if at all?

A. Well, he could stand it for a while, then he would have to quit; he would have to lay off; that continued all spring. As to how long a period he would be able to work, he might work a day at a time, and maybe could not work a day at a time. If he worked a longer period than a day, he would be worn out. As to the type of work that he attempted to do that spring of 1920, he did some harrowing, but I did practically all the heavy work.

Mr. BALDWIN: We ask that the last part of the answer be stricken as not responsive.

The COURT: Yes, it is not responsive.

Q. Now what, if anything, other than harrowing did he do in the spring of 1920?

A. I don't remember as he done much of anything of the work, maybe that was 1920. There was quite a lot of summer fallowing in 1920. That was done in 1919. That summer fallowing was prepared before [205] Carl came back from overseas. That summer fallowing consisted of somewhere around seventy acres.

(Testimony of Ferd Noble.)

Q. And aside from that seventy acres, how many acres did you put in, in the spring again in 1920?

A. Well, I don't just remember, but we put in some spring crop.

Q. And was it all on the place that Carl owned?

A. I don't remember whether it was all on that place or not.

Q. Did you have some crops that year on some other place?

Mr. BALDWIN: We object to this as leading.

The COURT: Yes.

Mr. BALDWIN: And assuming conditions that are not shown in the evidence.

In the spring. After Carl came home, state just what the crop was you put in that spring, if you can recall?

A. Let's see. We put in that seventy acres. I think the crop was all on his own place but I won't say for sure. There were about seventy acres summer fallowed, and eighty acres of spring wheat; about one hundred and twenty acres in spring wheat, I think. Beside the seventy acres of summer fallow. As to whether I had any help to put that crop in that spring, I put that crop in practically all myself. Carl did not do anything towards putting in the crop other than what I have already testified to. The summer or fall of 1920, I did practically all of the harvesting. We had help during the harvesting season. During the harvesting season we had one hired man. As to whether Carl did any of the

(Testimony of Ferd Noble.)

harvesting, he did the cooking, mostly the cooking. In the year 1920 there was summer fallowing done; there were about forty acres summer fallowed, if I recollect rightly. I did that summer fallowing. Carl did practically none of the work of summer fallowing that fall. [206]

Q. And in the spring of 1921, how big a crop did he put in?

A. 1921, we put in that summer fallow and about thirty acres, that is in the spring. That summer fallow was put into winter wheat, and in the spring we put in about thirty acres more. I planted the winter wheat on the summer fallow. As to who planted the spring wheat in the spring, Carl started to plant that, and then I finished it up. It took a little better than two days to seed that place. Carl worked at it about half a day.

Q. And did he quit then at the end of the half day?

Mr. BALDWIN: We object to that as leading.

The COURT: Yes.

Q. Do you know why he quit?

Mr. BALDWIN: Object to that as calling for a conclusion.

The COURT: He may answer.

Q. Answer yes or no, whether you know why he quit?

A. Because he was not feeling right. In 1921 I helped some in harvesting that crop, and he had some hired help. The hired man that he had was

(Testimony of Ferd Noble.)

Bert. Ingram. There was some summer fallowing done on the place the summer of 1921. He had Bert Ingram do some of it, and I done some of it. I don't remember how much I summer fallowed that summer and fall of 1921, I think it was probably about fifty acres.

Q. And then the next spring, who, if anybody, put in the crop and that summer fallow, or was it put into winter wheat?

A. That summer fallow was put into winter wheat. I did the drilling and put in the winter wheat. Carl did practically nothing toward the summer fallowing that year. As to whether he did anything toward the planting of it, or seeding of it to winter wheat, I think Bert Ingram, but I won't say for sure, but I think Bert Ingram seeded that, but I won't say for sure. I don't think Carl seeded [207] it.

Q. Why is it that you are not sure?

Mr. BALDWIN: Move that it be stricken. He was asked if he knew and he said he did not.

The COURT: Yes that is true. Strike it out.

Q. What is it that you are in doubt about?

A. I don't know. I can't remember whether Carl done it, or whether the other man done it. There were about fifty acres to seed. It would take a man probably close to four days to seed that. That next spring, the spring of 1922, there was some spring wheat put in beside the crops that were put in on that summer fallow, I think there were about thirty acres. As to who prepared the ground to seed that,

(Testimony of Ferd Noble.)

in 1922, I did part of that work. I don't remember who the other man was that they had there. There was another man there that spring.

Q. Did he also assist in putting that crop?

Mr. BALDWIN: We object to that as leading.

The COURT: Yes, but we have got to get through with this sometime, if we can. Why cannot you hurry it up? It is not necessary to go into all these details to find out whether the Plaintiff did any work there.

A. I know that Carl did some work toward putting in the crop that year. I couldn't say how much work he did do, that is in 1922 he was sick in the spring; he laid off some. I don't remember how much work he did. In 1923 I know that he did not do any work; nor in 1924. He has not attempted to do any work since 1922. As to what his physical condition has been during the years between 1919, when he came back, and 1922, it has been no good. His condition during those years has not been any different than what I have already described to the jury. Since 1922, as compared [208] to the time before 1922, he may be a little more nervous. During those years since 1922 he has been in the hospital, or away from the ranch. Sometime he has been the hospital. I cannot state what the dates are. It has been on more than one occasion.

Cross Examination by Mr. Brown:

I don't know that Carl was any better farmer than the average farmer before the war. I guess he

(Testimony of Ferd Noble.)

did understand the farming operations before the war. I know he was farming before the war. He knew how to manage a farm, or run a farm. I was not living on this farm in 1923; nor in 1924; nor in 1925. I was not living on that farm any year after 1925. I was living on the farm when my brother came home from the war. After he came home from the war I made my home on that farm until the fall of 1923. I stated that in 1920 my brother did not do the plowing and seeding on the farm. If he said in his deposition that he did, I would say that he didn't do it all. He did not do the largest portion of it in 1920; I did the largest portion. I stated that I moved off in the fall of 1923.

Q. Did you and your brother have a division of some of that land that you were farming there?

A. What do you mean? Before 1923, do you mean?

Q. No, when you moved off, you did not divide?

A. Not that land, no. After I moved off the farm, my brother had the whole place, whatever it was. He did buy some other land. I think it was about two hundred acres. I would say for sure when he did buy that other land, I think it was 1925. I guess he added to his livestock.

Q. I am just trying to get the best of your judgment. You think it was 1925 he added to his livestock there, didn't he? [209]

A. In 1925?

(Testimony of Ferd Noble.)

Q. No, since he came back from the war, he has lived there and occupied that as his home, ever since he came back from the war?

A. Outside of when he was in the hospital. He came back there in 1919. He came back in the latter part of July. He lived all of 1919 there, and he lived all of 1920 there. I don't know about these times, he went to these hospitals. I never did go to a hospital with him. I did see him in the Lewistown hospital. He was in the Lewistown hospital in the spring of 1933, I believe. That was the only hospital I ever saw him in was the Lewistown hospital. I cannot say how much of the time he was away from home since he came back from the war. I don't know how long he was in the hospital. I never saw him in those hospitals, outside of the Lewistown hospital.

Witness excused.

Whereupon the hearing was continued until Thursday morning, October 31, 1934, at 9:30 o'clock. Thursday, Nine Thirty o'clock, October 31, 1934.

Whereupon

MRS. CARL NOBLE

was recalled as a witness on behalf of the Plaintiff, and testified as follows:

Direct Examination by Mr. Molumby:

As to where Carl was in the spring of 1933, Carl was very sick, and had to be taken to the Lewistown

(Testimony of Ferd Noble.)

hospital. He was there two weeks, and from there he was transferred to the United States Veterans' Hospital at Helena. He was in the hospital at Helena for nine months. At the expiration of those nine months he was taken home, because I was a nurse and could take care of him. I remember when he was brought home, it was just after Thanksgiving day. He was brought home on a stretcher. We have a wheel-chair, and we have been laying him down on that. I have put [210] him out in the sun, the warm days in the sun.

Q. How did you bring him up here? Is he in Great Falls?

Mr. BALDWIN: I object to that as immaterial, and for the purpose of creating sympathy.

The COURT: Yes, I will sustain the objection.

Q. Where is Carl now?

Mr. BALDWIN: We object to that.

The COURT: I think it is understood that he is sick in the hospital and not able to be here.

No Cross Examination.

Witness excused.

Whereupon

DOCTOR ALRED,

a witness called and sworn on behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. Molumby:

I am the Doctor Alred who has already been sworn in this case. My full name is Ivan Alred.

(Testimony of Doctor Alred.)

I reside in Great Falls. My profession is that of a physician and surgeon. I have practiced that profession for several years. My practice has been in Great Falls.

Q. What school, if any, did you attend?

Mr. BALDWIN: We will admit the qualifications of the Doctor.

WITNESS continuing: I am acquainted with Carl F. Noble. I have examined him in my professional capacity. I made that examination last Friday evening.

Q. And will you state to the jury just what your findings were, upon your examination of him?

A. I was asked to see Mr. Noble to see if his condition was such that he might come into court.

Mr. BALDWIN: I object to that as immaterial.

The COURT: Yes.

Q. Just state what your findings were. [211]

A. I found a very sick man; a man who was too weak to stand unassisted; anemic, nervous; stuttered in trying to answer questions; complained of a multitude of symptoms including vomiting, palpitation, weakness, loss of appetite or no appetite. I don't know of any more complaints. I found upon my physical examination of him an anemic man that was unable to stand unassisted; who has gross tremor of the hands or other muscles; the legs are very atrophied, from disuse. He has a distinct stutter or imperfect speech when asked a question;

(Testimony of Doctor Alred.)

and from his history I found it difficult to get any intelligent history. He has thought his symptoms so long——

Mr. BALDWIN: We object to what he thought about it, as a conclusion.

The COURT: Yes, that is a conclusion. Strike it out.

A. In answering questions as to what he complained of, he stated things which were not explained, making it difficult to state what his complaints really are. As to whether I examined his pulse and heart, I did not examine him that evening, but at a later date I examined him, complete physical examination.

Mr. BALDWIN: That examination was for the purpose of testifying was it not?

A. The later examination was for the purpose of testifying.

Mr. BALDWIN: I object to that as incompetent, irrelevant, and immaterial.

The COURT: What part of it, all of it?

Mr. BALDWIN: No, the part that is for the purpose of testifying. He has not given him treatment with any idea of prescribing merely for coming into court and testifying.

WITNESS: I have the patient under treatment at the present time.

Mr. BALDWIN: We also add the ground that it is too remote. [212]

(Testimony of Doctor Alred.)

The COURT: I will overrule the objection.

Mr. BALDWIN: We will note an exception. May we have a general objection and exception along this line to each question.

The COURT: Yes.

Q. Do you recall the question?

A. Yes. I examined his pulse and his blood pressure, heart rate sounds. He carries a constant high pulse rate. 99 to 100 or better. His blood pressure is from 182 to 202. His heart sounds are similar in character; shows a weak myocarditis. That means heart muscles. I should have said his reflexes are exaggerated. I mean the reflexes, such as the jaw, the muscles of the arm, the abdomen. That is the tentative reflexes which are indicative of his present nervous disturbances. Laboratory tests show the degree of his anemia. I did not make the laboratory test, I had them made. As to what else I observed in his physical examination, upon my examination, the outstanding thing besides his physical condition is the apparent mental disturbance. It is such that I classify him as a definite neurotic, which is not mild at all. As to what was apparent to me from my examination of his heart condition that I have described it was apparent that he had no reserve, that his heart is being taxed to the utmost constantly, so much so that an exertion would endanger his life. As to how severe an exertion, I will say that I would not feel that he would be able as an example, to be walking about without endanger-

(Testimony of Doctor Alred.)

ing himself. As to whether there is anything else in his condition that I have not as yet described, that I discovered he showed evidence of past care; he had a scar in his abdomen of an operation for appendicitis; and he has another scar below the right rib margin, which is operative in character, and from which I am told a tumor was removed. [213]

Mr. BALDWIN: By whom were you told that?

A. By the patient.

Mr. MOLUMBY: Q. Did you notice anything with reference to his kidneys?

A. Yes, a kidney function test, shows practically a minimum function to insure life.

Q. Will you state what your diagnosis of the plaintiff's condition is?

Mr. BALDWIN: We object to that as immaterial, what his present diagnosis shows; too remote.

The COURT: He may answer.

Mr. BALDWIN: Note an exception.

A. His diagnoses are multiple, they are as follows: anemia, nephritis, chronic; myocarditis, hypertension arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate. I will state what I mean by anemia, it means less than a normal amount of red blood content. By nephritis, it means an impairment of the kidneys. Myocarditis means a weak heart attack of the heart muscles. Hypertension means an increase over a normal amount of blood pressure. Arterial sclerosis means the hardening of the arteries on some part

(Testimony of Doctor Alred.)

or all parts of the body. Atrophy of the legs means that both in size and ability have shrunken, or disappeared.

Q. Doctor, defining the term total disability as follows: Total disability being any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health and that total disability is to be considered as permanent when it is of such a nature as to render it reasonably certain that it will continue throughout the life time of the plaintiff, and [214] that total disability does not mean helplessness or complete disability, but includes more than that which is partial; permanent disability means that which is continuing as opposed to that which is temporary; that distinct periods of temporary disability do not constitute that which is permanent. That the mere fact that one has done some work is not of itself sufficient to defeat ones claim of permanent total disability. He may have worked when really unable, and at the risk of endangering his health or life. If one is able to follow a gainful occupation only spasmodically, with frequent interruptions due to his disability, or if the periods of work, though more or less regular and continuous were done at the risk of endangering his health or life, he was nevertheless totally and permanently disabled, but on the other hand if he was able to follow a gainful occupation regularly without frequent interruptions be-

(Testimony of Doctor Alred.)

cause of his disability then he would not be totally and permanently disabled. And taking into consideration, Doctor, the examination which you made of the plaintiff, and considering these facts to be true that Carl Noble enlisted in the United States Army on the 20th day of September, 1917, and served in the United States Army down to and including the 30th day of June, 1919, in the 60th infantry, of the 5th Div., first going to Spokane, Washington, then to Camp Gettysburg, Pa., thence to Camp Green, Charlotte, North Carolina, and while at Camp Green had the mumps, reported to the Infirmary and the Doctor ordered him back to duty, and that that same afternoon again reported to the Infirmary and was examined by two doctors who decided there was nothing wrong with him; that he then reported to the Infirmary again the next morning and he was given castor oil and marked "duty", and went back to camp and took a detail out to clean out ditches, and the next [215] morning the mumps went down on him, and he then again reported to the Infirmary, and the Doctor told him he had had the mumps but was over them; that he had a swelling in the groin and testicles and was moved to Camp Merritt while in that condition, and was there in bed for a couple of days while in quarantine, and remained in quarantine for about a week with no duties to perform, and at the end of the quarantine went to Hoboken and boarded ship for France on the 16th of April, 1919. Upon ar-

(Testimony of Doctor Alred.)

riving in France was sent up to the front with his division in the Alsace-Lorraine Sector and was 15 days under shell fire, in that sector, he being a wagoner whose duty it was to go up with the supply train from the railheads to the front line, and thereafter was 39 days under shell fire in an area south of St. Mihiel, and later was under shell fire for 10 days in the St. Mihiel, and still later 39 days under shell fire in the Meuse Argonne, and that he was gassed in the St. Mihiel offensive, vomitted and was sick to his stomach, had diarrhea, felt sick and sore in the chest for a week or ten days; then later while in the Argonne was again gassed and vomitted frequently for several days and had diarrhea which remained with him until after the Armistice was signed, and on neither of these two occasions, reported to the hospital or infirmary for treatment; that while in the Argonne near Mont Foucan a shell exploded under the wagon he was driving, tearing off a portion of the wagon, the end gate and brake; the team hitched to the wagon running away and piling up at the foot of the mountain with the plaintiff tangled up in the pile-up; that five days later had aged greatly and from then on was extremely nervous, excitable and would stutter when he talked, would wave his arms and looked wild, had starey eyes, would scream and yell at the horses and men, and even at the officers, and that [216] this condition remained with him all during the rest of his service in the army and existed at

(Testimony of Doctor Alred.)

the time of his discharge from the army and has remained at all times since then to the present date. That after this experience the plaintiff did not report to the hospital or infirmary for treatment; that after the Armistice was signed he proceeded with his regiment to Luxemburg, and while in Luxemburg had the influenza and was laid up in his billet in bed for four or five days, and when he got up was sick and was a long time getting his strength back, and thereafter and until his discharge had very little to do as far as duty was concerned until he came back to this country with his regiment and was discharged. That after his attack of flu in Luxemburg he was short of breath and got fatigued quickly and at the time of his discharge from the army was nervous, soft, couldn't stand much exertion and when exerted himself was short of breath and the veins in his neck would throb, his ears would throb and he would have palpitation, and that on the 31st day of December, 1918, the plaintiff was cited for devotion to duty during the St. Mihiel and Argonne offensives.

Mr. BALDWIN: We object to that part as immaterial.

The COURT: Yes, it is immaterial.

Mr. MOLUMBY: Disregard that statement with reference to the citation to devotion to duty.

That after being discharged from the army he returned to his home in Grass Range, Montana and lived with his brother on the ranch occupied by him

(Testimony of Doctor Alred.)

prior to his entry into the army, doing no work that Fall or Summer except that he did some plowing and when plowing would find himself rigid and stiff on the plow, would then relax and before he had gone 30 rods would be in the same condition—just as tight as a fiddle string. That his work [217] would be interrupted because of sleepless nights; he would get to palpitating and the bed would seem to shake and when he didn't work he wasn't troubled much, but when he worked would be restless, his heart would pound and he could feel the bed shake, he would have nightmares and troubled dreams. Most of them were connected up with men hollering; these fellows in his dreams had liquid fire on them and were hollering and he would want to put the fire out and imagined that he had it on himself sometimes even though he had never personally encountered liquid fire while in the army, or at all. If he worked after a night of that kind it would be worse the next night; that that winter of 1919 and 1920 he did not do any work and in the spring of 1920 his brother put in the crop on his ranch and it was necessary for them to hire a fellow a few days at a time because the plaintiff was unable to go ahead with the work, but did some of the easiest jobs; that the plaintiff drove the team some and could stand it a while and then would have to quit; he would work a day at a time and then would have to quit. That that summer and fall the crop was harvested by his brother and hired help; that in

(Testimony of Doctor Alred.)

the spring of 1921, the plaintiff worked upon the seeding of 30 acres for about a day and had to quit because he was sick, and his brother and one Bert Ingram put in the crop on the place in 1921; that that summer the crop was harvested and threshed by his brother and Bert Ingram; that in summer of 1921 the summer-fallowing of about 50 acres was done by his brother and one Bert Ingram and in the spring of 1922 his brother and a hired man put in 40 or 50 acres of summer fallow and 30 acres of spring wheat, the plaintiff doing a little of the work in seeding for a day or two at a time; that since that time the plaintiff has attempted to do no work whatever and has been unable to do any work whatever: [218] that in the fall of 1919, in November, he procured a mixture of digitalis from the druggist in Grass Range and at which time he had a jumpy throbbing pulse and palpitation, a temperature of 99.6, shortness of breath, an eye stare, was nervous, fidgity, haggard and stuttered. Thereafter, and over a period of 18 months off and on he procured a similar medicine from the druggist; that in February, 1923, he was examined by Dr. Porter of Lewistown and found to be suffering from heart trouble and extreme nervousness, and was advised to go to the Government hospital. That when he first returned from the army he was weak and pale, had aged greatly while in the army; had become grey haired, was short of breath, was highly nervous, excitable, stuttered, would get incoherent

(Testimony of Doctor Alred.)

when talking and used his hands and his hands fluttered when talking; that this condition has existed ever since his discharge from the army, this condition of nervousness that I have just described has existed ever since his discharge, to the present date; that he has gradually grown a little worse; that he was in the Deaconess Hospital and operated on for appendicitis in June or July of 1922 and was in the Veterans Bureau Hospital at Fort Harrison in 1923 for about 6 weeks in the early spring, and in the following February went to the U. S. Veterans Bureau Hospital in St. Paul, known as the Aberdeen Hospital, and was in bed for a period of 13 or 14 months, and then returned to his ranch at Grass Range and was again hospitalized in 1931 in Helena for 6 or 7 weeks and again in the spring of 1932 was in the hospital at Ft. Harrison, Helena, Montana, for three weeks, and again in the spring of 1933 was hospitalized at Lewistown, for a couple of weeks, and transferred from the hospital at Lewistown to the hospital at Fort Harrison where he remained for a period of nine months, at which time he was brought [219] home on a stretcher, and has remained in bed ever since, and up to the present date. Assuming these facts to be true, Doctor, and taking into consideration what you observed of the plaintiff on your examination of him, and defining total disability, as I have heretofore in this question defined it, state whether or not the plaintiff Carl Noble was or was not in your opinion totally and permanently

(Testimony of Doctor Alred.)

disabled on the date of his discharge from the army, July 30, 1919.

Mr. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law, means this, and this only. Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by Counsel into the question is used in the argument by the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the conclusion of the expert, if stated to him, which do appear from the records in this case.

The COURT: Overrule the objection.

Mr. BALDWIN: I will ask an exception.

A. Taking those as facts and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He [220] was undoubtedly, totally and permanently disabled if those be true facts in following your definition.

(Testimony of Doctor Alred.)

Q. And at what time?

A. At the time of discharge.

Cross Examination by Mr. Baldwin:

Q. Well, now, if we define total and permanent disability as an impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful employment, which is of such a nature and character, and is founded upon condition which renders it reasonably certain that it will continue throughout the life of the person suffering it, would your opinion be different?

A. I didn't get any essential difference in your definition there that would change my opinion.

Q. Well, what is your distinction between the two definitions?

A. I didn't get any difference between yours and his.

Q. To you they mean the same? You never saw Carl Noble until a week or two ago?

A. Last Friday night is the first time I ever saw him.

Q. And you don't know on what day he was discharged from the army.

A. Only as I heard it read. I have not attempted to memorize it.

Q. That was on the 30th day of July, 1919. Could you, from your examination and the things known to you, determine what the condition of Carl Noble was on that date?

A. Not in the least.

(Testimony of Doctor Alred.)

Q. Could you determine from your examination whether he was or not able to carry on an ordinary occupation, gainful in character, on the date of his discharge from the army, July 30, 1919? [221]

A. No.

Q. Could you determine from your examination that he had any heart condition at that time?

A. No sir.

Q. Or that he had any nervous condition?

A. No sir.

Q. Could you determine from your examination in any way as to what his condition was at any time prior to, we will say, 1930?

A. No.

Q. Or 1932, as far as that is concerned?

A. No.

Q. Or 1933?

A. Yes, you would have a right to an opinion at a recent date on it. I cannot tell when any of these conditions actually existed. I have not specialized in diseases of the heart. I have not specialized in diseases of the nerves. Now, the myocarditis means that the muscles of the heart have been mildly affected.

Q. I think you said you found a mild myocarditis?

A. I didn't say mild, I said myocarditis. In that case it means simply muscles of the heart. That is the condition of the muscle itself, and not of the valves, or other portions of the heart. I could not

(Testimony of Doctor Alred.)

determine from that heart condition that the man was unable to follow a substantially gainful employment in 1930; or any year prior to that. I said I also found anemia.

Q. That simply means a weakening of the system, run down condition.

A. No, I testified that showed as a lessened blood content.

Q. To the average man it means that the system is run down?

A. The system is run down in that condition, but anemia does not mean that. [222] By his present examination you cannot tell when that anemia came into being. I spoke of chronic nephritis. That means a kidney impairment. As to what extent his kidneys were impaired at the time I examined him, they are very markedly impaired at the present. I stated that that condition was such that they were functioning merely to the point that would sustain life. I cannot tell when that condition came into existence. It may not have come into existence until 1930 as far as my observation was concerned.

Q. Doctor, I will ask you whether the heart condition that you found would reasonably follow the kidney condition, or the kidney condition resulting from the heart condition?

A. There is a distinction between the heart and kidney. The heart being the pump which furnished the power by which the kidneys do their secretion. If the kidneys fall down on their work, the heart

(Testimony of Dr. Alfred.)

has that much more work to perform; which might bring about the conditions that I found. In the myocarditis.

Q. Is it reasonable to suppose that the kidney condition was the cause that superinduced the heart condition?

A. No, that is not necessarily a reasonable supposition.

Q. I didn't ask you about any supposition. I said it was reasonable to suppose?

A. No, that is not a reasonable supposition. I can't determine which condition came into being first. In my opinion I doubt whether any one else can. Hypertension means an increased blood pressure, an increase over normal. Carl's age was 46, I believe, at the time I examined him. The increased blood pressure in my opinion, resulted from his sclerosis and his nephritis, and his increased nervous tension. Sclerosis means an increase in the deposit of the lime salts in the blood vessel wall. In other words, [223] the hardening and contraction of the arteries. That hardening comes about normal as we advance in years.

Q. And at forty-six many men have that condition that you found in him, so far as the condition of the wall and blood vessels are concerned?

A. It is not an uncommon finding.

Q. So that as far as that condition was concerned, there was nothing out of the way for a man of his age?

A. Yes, he has it beyond the ordinary.

(Testimony of Doctor Alred.)

Q. That condition comes around as a reason of hard work very often at a premature time?

A. This question of hard work, it is a doubtful question, if hard work causes the hardening of the arteries.

Q. It may, may it not?

A. I don't believe there is any proof to that effect.

Q. I am asking your opinion?

A. I doubt it.

Q. Now, you found the legs atrophied. You don't know when that condition came about, do you?

A. I can say from examinations that it has been existing for some time. In my opinion for a year or more.

Q. But that would not carry it back beyond 1930?

A. I cannot say how far it might go. I can say it has existed that long.

Q. And that, in your opinion, would be the approximate time that that condition had existed?

A. No, I will state that it has existed for that length of time, or more.

Q. Give us the extreme length that you can say from your examination that condition has existed?

[224]

A. I cannot say how long it existed. It may have existed for thirty years so far as present findings are concerned. I cannot fix a definite date when it came into being. I found an enlarged prostate. I

(Testimony of Doctor Alred.)

will tell the jury what that means. The prostate is the gland that sets under the urinary bladder, connected with the sexual organs, and an enlarged condition simply means that it is larger than the normal prostate for a man of his age. I cannot tell when that condition came into being.

Q. Now, Doctor, let us assume as a fact, in addition to what you have already considered in forming your opinion, that on the 28th of July, 1919, your patient Carl F. Noble, was examined for discharge from the United States Army; that at that time he was asked this question: "Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disability or impairment of health, whether or not incurred in the military service, to which he answered, "Yes". That he was then asked this question: If so, describe the disability, stating the nature and location of the wound, injury or disease, to which he answered "hearing". That he was asked this question immediately thereafter: "Q. When was the disability incurred?" to which he answered, "A couple of months ago." That he was then asked this question: "Where was the disability incurred?" to which he answered, "France." Whereupon he was asked this question: "State the circumstances, if known, under which the disability was incurred?" "A. Unknown." And that after giving those answers to the questions asked, Carl F. Noble stated

(Testimony of Doctor Alred.)

in writing, and over his hand or signature written by him: "I declare that the foregoing questions and my answers thereto have been read over to me, and that I have fully understood the questions, and that my replies to them are true in every [225] respect, and are correctly recorded." Mr. Molumby: Objected to on the ground that it is assuming a fact not in evidence. Mr. Baldwin: It will be in evidence. I am going to put in the war record. Mr. Molumby: I am not so sure about that. The Court: Your inquiry is whether that would make any difference in his opinion? Mr. Baldwin: Yes. The Court: Overrule the objection, providing you place that in evidence.

Q. Now, assuming those things to be facts, and true, that the only disability that was known to Carl F. Noble at the time of his discharge from the army was with reference to his hearing, and assuming that he did not know when that condition came about to be true, and assuming that he made no complaint of any nervous involvement or heart condition, or kidney ailment, or any complaint of any physical kind excepting that his hearing had been affected would that in any way alter your conclusion in this case?

A. Not if the other facts as recited were true.

Q. I know, but, considering this added fact.

A. Assuming that, it would not alter that, because patients do not know what ails them.

(Testimony of Doctor Alred.)

Q. His statement, or failure to state that he had not any heart impairment, or kidney ailment, would not in any way enter into the question?

A. No, he might not know at the present that he had any kidney ailment.

Q. Would the want of knowing that he had any kidney ailment at that time affect his ability, in your opinion, to carry on continuously a substantially gainful employment?

A. Yes.

Q. Would the presence of——

A. Would the lack of it? [226]

Q. Yes.

A. If he had kidney impairment, or lack of kidney impairment, it would not impair his earning ability?

Q. Do men have serious involvements of kidney conditions without knowing it frequently?

A. Frequently, yes. They do not have pounding of the heart without knowing it. They do not have palpitation of the heart without knowing it. If he had myocarditis he would know it.

Q. If they had a pounding of the heart and palpitation of the heart?

A. They would know that.

Q. Let us assume that at the time that he was examined on discharge in the army on July 28, 1919, that Carl F. Noble did not know that he had palpitation of the heart, or pounding of the heart,——

Mr. MOLUMBY: That is objected to on the ground that it is assuming a fact not in evidence.

(Testimony of Doctor Alred.)

Q. Let us assume that at the time he was examined on discharge in the army on July 28, 1919, that Carl F. Noble did not know that he had palpitation of the heart, or pounding of the heart, would that in any way alter your conclusion in this matter?

Mr. MOLUMBY: Just a moment.

The COURT: It seems to me that is verging on a disputed statement. In the deposition doesn't it tell about the palpitation of the heart very close to the time of his discharge, and have not the witnesses here testified to that?

Mr. BALDWIN: I am not in a position to say. That is for the Jury.

Q. Do you recall the question?

A. I believe you said assuming that he did not know that he had palpitation of the heart, would that impair his earning ability? [227]

Q. Would that alter your opinion in the case?

A. Well there is an error there, because palpitation or pounding of the heart is something that the patient recites; nobody else can determine that for him. That is a symptom which he observes; no one else, if he had it, he would know he had it. If he had that palpitation he would know he had it.

Q. And if he had that condition at that time, or rather did not have that condition at that time, it would have a material bearing on your conclusion, would it not?

A. If he did not have?

Q. If he did not know that he had a palpitation or pounding?

(Testimony of Doctor Alred.)

A. It would overrule the evidence that was stated to be in this question that he had palpitation.

Q. It would cause your opinion to be entirely different?

A. It would alter that.

Q. We will assume further in the statement of fact that I have stated to you, Doctor, that prior to his discharge from the army, and on July 28, 1919, a duly qualified and competent physician and surgeon made a complete physical examination of Carl Noble, the plaintiff in this case, and found the only condition observable by him, which might affect the health of the plaintiff here, was that his hearing was R 18-20, L 18-20, and Otitis, media, catarrhal, bylateral, maximum benefit obtained. Would that any way, taking it as a fact, that those were the only things wrong with the plaintiff here, in any way affect your conclusion?

Mr. MOLUMBY: We desire to object on the ground that it is assuming a fact not in evidence.

Mr. BALDWIN: It will be——

The COURT: He has promised to put it into evidence. I think you ought to have it in evidence. I will overrule the objection. [228]

A. If this was a complete physical examination, and made by a competent physician, many of these factors should have been found if they were present.

Q. Well, the physician certified it as a careful physical examination

A. If I may qualify that that related to his kidney condition his physical condition will not dis-

(Testimony of Doctor Alred.)

close anything there. It takes laboratory work. You have not mentioned whether his kidneys were examined in that respect.

Q. I am merely reading from the record; the items are after a careful examination of the patient, were "hearing R 18-20 L 18-20. Otitis, media, catarrhal, bylateral maximum benefit obtained. Assuming that was all that was found after a careful physical examination by a competent physician and surgeon, would that in any way be considered by you in arriving at your conclusion in this case?

A. No, because of the facts I just stated. You have disclosed nothing of laboratory findings. Blood pressure is not stated. Kidney condition is not stated.

Q. Would not the physician and surgeon's examination with reference to the heart, the condition of the nerves, and things of that kind, in making a careful physical examination?

A. He should.

Q. And if ordinarily, if he certifies that he has made a careful physical examination, it would include an examination along the lines you have indicated?

A. His present statement should include some of those facts also.

Q. We will assume that the certificate is as follows: "I certify that the soldier named above has this day been given a careful physical examination, that is, Carl F. Noble, the plaintiff in this case, has this date, the date is July 28, 1919, been given [229] a careful examination, and it is found that he is

(Testimony of Doctor Alred.)

physically and mentally sound. He is physically and mentally sound with the following exceptions: describe the nature and location of these defects: wound, injury, or disease, "hearing R 18-20 L 18-20. Otitis, media, catarrhal, bylateral. Maximum benefit obtained."

The COURT: Isn't that the third time that you have propounded that question. It seems to me that it is three times you have read that question to this witness.

Mr. BALDWIN: I read this part, the certificate was not read and was brought by his statement.

Q. When that condition was found by a competent physician and surgeon, and after a careful examination, and the defects set out were the only defects, were the results of that examination, would that affect you in arriving at a conclusion in this case?

A. If I assume that was a competent and complete examination, physical examination, I can further assume that he did not suffer any other impairment.

Q. And it would materially affect your opinion in this case?

A. If I had such information, yes.

Q. Now, hearing R 18-20 means what?

A. 20-20 would be normal 18-20 hearing, is an impairment of that fraction. R is right and L is left. That would mean a very slight impairment of hearing, 18-20.

Q. What does Otitis, media, catarrhal, bylateral mean?

(Testimony of Doctor Alred.)

A. It is an inflammation of the external ear on both sides.

Q. In other words, R 18-20 and L 18-20, Otitis, media, catarrhal, bylateral, refer to the effect of hearing caused by the conditions you have related?

A. This is a statement of his hearing ability. The other is a statement of his physical condition, in his ears, which would [230] result in the defective hearing.

Q. Let us assume, Doctor, that later on, on that day July 28, of 1919, a board of competent United States Army Physicians and Surgeons—

Mr. MOLUMBY: I cannot understand by what stretch of imagination an assumption can be made that any of this is competent.

The COURT: This record that he has got before him is probably competent and will be admitted in evidence. And he has a right to refer to that on cross examination, interrogate that witness as to whether if such and such records of examination are true, it would alter his opinion.

Mr. MOLUMBY: There is nothing to show that it is competent.

The COURT: I think it should have been introduced into evidence in the first place. Let them examine and make their objection to it before you propound any question at all. I have tried so many of these cases I was taking it for granted that it was competent and would be introduced.

Mr. BALDWIN: I wish to state in the record at this time that the papers signed by Carl F. Noble

(Testimony of Doctor Alred.)

and referred to by me on cross examination here, is marked now as Defendant's Exhibit No. 3. That the paper I read from second, being the report of the medical examiner of July 28, 1919, is marked as Defendant's Exhibit 3A; that the paper that I am reading from at the present are marked as Defendant's Exhibits 3b and 3c.

Mr. MOLUMBY: Plaintiff desires to object to the offer of Defendant's Exhibit 3 upon the ground and for the reason that the same is not properly identified; no foundation laid; nothing to prove that that is the signature of Carl F. Noble; nothing to prove that he did sign this. It is now offered after the deposition of the Plaintiff has been taken, when it should have been offered as a [231] portion of his deposition, if taken at all, when he would have an opportunity to explain the circumstances under which it was signed and plaintiff objects to the offer of Defendant's Exhibits 3a, b and c, on the ground and for the reason that no proper foundation has been laid; nothing to show who signed the various pages of those exhibits; nothing to show that they were signed by the party purporting to be signed.

The COURT: Do those exhibits purport to be signed by the plaintiff?

Mr. MOLUMBY: One of them is purported to be signed by a first lieutenant; another by a major in the medical corps.

The COURT: What about the plaintiff?

Mr. MOLUMBY: The first one, Exhibit 3, is purported to be signed by Carl F. Noble, and it is all a portion of the same exhibit, all purports to be recorded at the same time.

(Testimony of Doctor Alred.)

The COURT: Properly authenticated public document, properly authenticated by the Secretary of War?

Mr. BROWN: Yes.

The COURT: I will overrule the objection.

Mr. BALDWIN: I assume that these may be considered read, and that I may use them at any time?

Mr. MOLUMBY: Without waiving our last objection, and may an exception be noted.

The COURT: Yes.

Whereupon Defendant's Exhibit 3, and Defendant's Exhibits 3a, 3b, and 3c were received in evidence and are in words and figures as follows, **to-wit:**

DEFENDANT'S EXHIBIT NO. 3.

UNITED STATES OF AMERICA
WAR DEPARTMENT [232]

Washington, October 12, 1934.

I HEREBY CERTIFY that the documents hereto attached concerning Carl F. Noble, AS#, 381, 589, who enlisted September 20, 1917, was overseas April 16, 1918 to July 19, 1919; and was honorably discharged July 30, 1919, are photostatic copies of report of physical examination at enlistment and report of physical examination at discharge, the originals of which are on file in the Adjutant General's Office. I further certify that he was reported

(Testimony of Doctor Alred.)

sick, in line of duty, diagnosis not stated. February 14, April 3, May 31, June 30, and July 15, 1919.

JAMES F. MCKINELY,

Major General, U. S. Army,
The Adjutant General.

I HEREBY CERTIFY that James F. McKinely, who signed the foregoing certificate, is the Adjutant General of the Army and, that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, George H. Dern, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of October, 1934.

[Seal]

GEORGE H. DERN,

Secretary of War.

By F. M. Hoadley,

Assistant Chief Clerk. [233]

Noble

Carl F.

(surname)

(Christian name)

PHYSICAL EXAMINATION FOR
ENLISTMENT

*Regular Army

Accepted—September 14, 1917, at Lewistown,
Montana.

*Enlisted—Sept. 20, 1917, at FORT GEORGE
WRIGHT, WASH.

INSTRUCTIONS

1. The name, date and place of acceptance, page 1, the statement of applicant, page 2, and first physical examination report, pages 2 and 3, will be filled out at the time of the applicant's examination for acceptance. The remainder of the report will be filled out at the time of his final examination preliminary to enlistment or rejection, as the case may be. The questions on page 2 will be asked before the applicant has been stripped, and any answer indicating a possible cause of rejection will be followed up by searching inquiry and examination and the result will be noted on the report.

2. The greatest care will be taken that the name of the applicant is correctly shown and that it corresponds with the name on his enlistment paper. The Christian name must not be abbreviated, but if it consists of more than one name, only the first will be written and signed in full.

3. Under the heading "Remarks" on pages 3 and 4, will be noted any authorized special assignment or waiver of defects, the nature of the authority being stated. The space under "Remarks" will also be used for continuation of an answer for which the

(Testimony of Doctor Alred.)

allotted space is insufficient and for any further statement that the examining officer may desire to make.

4. The physical examination will conform strictly to the provisions of the rules for the examination of recruits. Deviations from normal [234] though not cause for rejection, will be noted under proper headings. Syphilis, as indicated by a positive Wasserman, is not cause for rejection, if other requirements are met. Syphilitics with open lesions or mental symptoms are subjects for rejection.

5. When the applicant is enlisted, the completed physical examination report will be forwarded to The Adjutant General of the Army by the recruiting officer with his trimonthly report. When the applicant is rejected, the report will be marked "Rejected" at the top of the first page of brief, and except in case of applicants with prior military service or naval service, will be filed at place of rejection. The report in case of rejected applicant with prior service will be forwarded to The Adjutant General with the trimonthly report.

STATEMENT OF APPLICANT.

Have you found that your health and habits in any way interfere with your success in civil life? and if so, give details—No.

Have you ever since childhood wet the bed when asleep?—No.

Do you consider that you are now sound and well—Yes.

(Testimony of Doctor Alred.)

What illnesses, diseases, or accidents have you had since childhood?—None

Have you ever had any of the following: If so, give approximate dates:

Spells of unconsciousness or convulsions—No.

Gonorrhœa—No.

Sore on penis—No.

Have you ever raised or spat up blood?—No.

When were you last treated by a physician, and for what ailment?—Not since childhood.

Have you ever been under treatment at a hospital or asylum, and, if so, for what ailment?—No. [235]

I certify that the foregoing questions and my answers thereto have been read over to me; that I fully understand the questions, and that my answers thereto are correctly recorded and are true in all respects.

I further certify that I have been fully informed and know that if I secure my enlistment by means of any false statement or misrepresentation I am liable to court-martial for fraudulent enlistment.

CARL F. NOBLE
(Signature of applicant)

(Testimony of Doctor Alred.)

PHYSICAL EXAMINATION AT PLACE
OF ACCEPTANCE*

(Applicant stripped. See instruction 4)

Weight—137 lbs., height—67 inches.

Eyes: Vision—right eye, 20-20; left eye, 20-20.

Ears—Hearing—right ear, normal—left ear,
normal.

Girth of chest (at nipples)—

At expiration, 30½ inches.

At inspiration, 34½ inches.

Flat foot.

I certify that I have personally examined the applicant, and that, to the best of my knowledge and belief, he fulfills the physical and legal requirements for enlistment.

J. W. KELM, JR.,

Captain U. S. Army, R. O. T. C.

Recruiting Officer.

Lewistown, Montana,

(Place)

September 14, 1917.

(Date)

If the applicant is enlisted at place of acceptance, this report will not be filled out, except where examination at place of en- [236] listment is made by a civilian physician.

(Testimony of Doctor Alred.)

PHYSICAL EXAMINATION AT PLACE
OF ENLISTMENT

(Applicant stripped. See instruction 4)

Weight—135 lbs; height—66½ inches.

Girth of chest (at nipples):

At expiration, 31 inches.

At inspiration, 35 inches.

General examination (head, chest, abdomen, extremities)—normal.

Nose and throat—normal.

Genito-urinary organs (urine will be examined in suspicious cases)—normal.

Hernia—No.

Flat foot or other deformities of feet—

Wasserman reaction (Regular Army only).

Eyes: Vision—right eye, 20-20; left eye, 20-20.

Ears: Hearing—right ear, normal; left ear, normal.

Teeth: Right— Left—

Missing teeth—No.

I certify that I have carefully examined the applicant, and have correctly recorded the results of the examination, and that, to the best of my ability, judgment and belief, he has no mental or physical defect disqualifying him from service in the United States Army.

W. E. ROBERTS,

Medical Corps.

1st Lieut. M. R. C.

FORT GEORGE WRIGHT, WASH.

Sept. 20, 1917.

(Testimony of Doctor Alred.)

REPORT OF PHYSICAL EXAMINATION OF
ENLISTED MEN PRIOR TO SEPARA-
TION FROM SERVICE IN THE UNITED
STATES ARMY. [237]

Noble—Carl F. * * * 23815 Sc

Cpl. Casual Co. No. 6

(grade) (Company and regiment)

rancher

(occupation prior to entry into service)

DECLARATION OF SOLDIER.

Question: Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?

Answer: Yes.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred.

A. Unknown.

I declare that the foregoing questions and my answers thereto have been read over to me, and that

(Testimony of Doctor Alred.)

I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

CARL F. NOBLE,
(Signature of soldier)

Witness:

GEORGE M. DUNFORD,
(Signature of witnessing officer)

George M. Dunford, 1st Lt. Inf.,
Fort D. A. Russell, Wyo. [238]

CERTIFICATE OF EXAMINING SURGEON.

I CERTIFY THAT:

The soldier named above has this day been given a careful physical examination and it is found that

*He is physically and mentally sound.

*He is physically and mentally sound with the following exceptions:

(Describe the nature and location of the defect, wound, injury, or disease)

Hearing R 18-20; L 18-20.

Otitis, media, catarrhal bilateral, maximum benefit obtained.

In view of occupation he is—no—per cent disabled.

Remarks:

J. E. McKILLOP,
M. C.; U. S. Army.
Major M. C., U. S. A.

(Testimony of Doctor Alred.)

Place—Fort D. A. Russell, Wyo.,

Date—July 28, 1919.

*Strike out the part of the certificate not applicable to the case.

*Strike out words not applicable.

(Endorsed on back Defendant's Exhibit 3B) [239]

CERTIFICATE OF IMMEDIATE COM- MANDING OFFICER.

I certify that:

Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

GEORGE W. DUNFORD,

1st Lt. Inf. Casual Co. No. 6.

Place—Fort D. A. Russell, Wyo., 7-28-1919.

*Strike the part of the certificate not applicable to the case.

*Strike out words not applicable.

(Endorsed on back 3a) [240]

REPORT OF BOARD OF REVIEW.

(See Instruction 2)

From a careful consideration of the case and a critical examination of the soldier,

We Find:

That he is physically and mentally sound, with the following exceptions:

(Testimony of Doctor Alred.)

(Describe the nature and location of the defect, wound, injury, or disease)

Otitis, media, catarrhal bilateral, right 18-20; left 18-20; hearing, defective pass—few months soldiers statement.

Maximum improvement attained.

The wound, injury or disease (is not) likely to result in death or disability.

In our opinion the wound, injury, or disease (did) originate in the line of duty in the service of the United States.

In view of occupation, he is no per cent disabled.

WM. J. CERCE,

Major M. C.; U. S. Army.

RUSS. S. CARTER,

Captain M. C.; U. S. Army.

Place—Fort D. A. Russell.

Date—July 28, 1919.

*Strike out the part of this certificate not applicable to the case.

*Strike out words not applicable.

(Instructions)

1. This report will be made out for each soldier, immediately preceding separation from the service in the United States Army.

2. If the declaration of the soldier and the certificate of the examining surgeons do not agree, the case will be referred to a board of review, to consist of not less than two medical officers convened by the

(Testimony of Doctor Alred.)

camp, post, or regimental commander, which will complete the report of this form. [241]

3. When completed the report will be forwarded, with the service record of the soldier, to the Adjutant General of the Army in compliance with instructions prescribed in orders and regulations.

(Endorsed on back 3c). [242]

Q. Let us assume, Doctor, that later on, on that day, July 28, 1919, a board of competent United States Army Physicians and Surgeons made a careful physical examination of Carl F. Noble, the Plaintiff in this case, and certified that the soldier named, the plaintiff here, has this date been given a careful physical examination, and it is found that, he is physically and mentally sound; he is physically and mentally sound with the following exceptions, describe the nature and location of the defect, wound, injury, or disease. Hearing R 18-20; L 18-20. Otitis, media, catarrhal, bilateral maximum benefit obtained." And that that was all they found with reference to the physical condition of this plaintiff at that time. Would that, taken as true, affect your conclusion in this case?

Mr. MOLUMBY: Objected to on the ground that it is repetition. The question having been previously answered.

The COURT: Haven't you put this one before?

Mr. BALDWIN: Not with reference to the examining board.

(Testimony of Doctor Alred.)

The COURT: I will overrule the objection, it sounds very familiar to me though.

A. That would not alter my opinion. I must qualify that statement because to so state alone is not sufficient. Many of these defects which he now has could have been overlooked by a competent board or competent physician.

Q. Assuming that those were the only things that he was suffering from at the time of his examination, it would alter your opinion.

A. If those were the only things.

Q. Do you think you overlooked any thing on your examination of Mr. Noble?

A. I probably did.

Q. For instance, what? [243]

A. I overlooked reciting many things that I see here. That was not the examination.

Q. Assuming that these were the conditions as they existed at that time, would it materially affect your opinion?

A. If those were the conditions it would not affect my opinion. If those were true findings it would affect my view. I can explain that to you if you so wish.

Q. Yes ahead.

A. I was going to state that if you bring in what the attorney brought out as to the nervous condition, mental and nervous condition in your question, and a cursory examination of a patient would not a board, or physician testify as to a mental and nervous condition at first examination?

(Testimony of Doctor Alred.)

Q. Now, Doctor, we will assume that the man Noble, was suffering from mild myocarditis. Would that alone render it possible for him to follow continuously a substantially gainful employment, and would leave one reasonably to believe that it was reasonably certain that it would continue throughout his life to be wholly unable to follow continuously any substantially gainful employment.

A. That is a matter of degree, to take mild myocarditis alone, if it was mild myocarditis he might follow a gainful occupation; if it was gross or marked he certainly could not follow continuously—

Q. There are many gainful occupations that would not require any physical exertion, or practically none?

A. Physical exertion, sure.

Q. Can you tell what the condition of Carl Noble's heart with reference to mild myocarditis was at any time prior to 1930?

A. By my present examination?

Q. Yes.

A. No sir. [244]

Q. Or by anything else known to you except by his statement?

A. Except by the statement, which I was told to assume as facts.

Q. Does myocarditis result from shock or fright?

A. Indirectly.

Q. Myocarditis is merely a disease of the muscles of the heart or weakening of the heart?

(Testimony of Doctor Alred.)

A. Yes sir.

Q. And how long would it take for the result to show, a myocarditis resulting from shock of the heart?

A. It is indefinite. It is a matter of defect accruing, or increasing until it became visible or apparent. Fright or shock being sufficient, it might show up immediately. In my opinion myocarditis may result from shock or fright, diseases of the heart that may result from those two conditions, shock or fright, may be of an entirely different character from myocarditis. That is the reason I stated that myocarditis would result indirectly. It would not be a direct result of fright or shock. As to what would be the involvement of the heart that might reasonably result from either shock or fright, I will say the palpitation, pounding, rapidity, regularity or irregularity might result from shock or fright, the nerve disturbances.

Q. And a man having those conditions would naturally know that he had them?

A. He would become aware of them, if he was mentally capable to recognize the symptoms. If his heart was pounding he ought to know that. That is what he means by heart pounding. That condition comes about when a man walks rapidly or up a hill. Palpitation is the same thing, it is a rapid heart beat.

Q. What does the stuttering indicate? a heart condition or a [245] myocarditis involvement?

(Testimony of Doctor Alred.)

A. A myocarditis involvement. I say that Noble at the present time has no appetite. That did not have any bearing upon my examination. I stated he had no appetite because I was asked what his symptoms were and what he was suffering from. It is a symptom of his present condition, but not of past condition, and it really has no bearing on the result I reached.

Q. Now, we will assume that after he left the army, and for a number of years thereafter, say five or six, up to 1930, that Carl F. Noble was a well nourished man. Would that have any bearing upon your conclusion in this case?

Mr. MOLUMBY: That is an assumption of fact not in evidence, your honor. We object to it on that ground.

The COURT: I don't recall whether it is in evidence or not.

Mr. BALDWIN: We will connect it up by competent proof, by depositions, if we can.

Mr. MOLUMBY: It is an assumption.

The COURT: I think you better eliminate it until you get the deposition. I will sustain the objection.

Mr. BALDWIN: And may it be understood that we may recall the witness for further cross examination when the deposition is here.

The COURT: Yes, on that proposition.

Redirect Examination by Mr. Molumby:

Q. In the question propounded to you concerning the exhibit, 3, 3a, 3b, and 3c, defendant's ex-

(Testimony of Doctor Alred.)

hibits of those numbers, counsel stated in question that if you were to assume that competent doctors did the things recounted in his question, had you any information other than what he stated to you as to their competency? [246]

A. No sir. I never heard of men that signed these exhibits. In fact I don't know who did sign them. He did not state that in his question. The answers I gave were based upon the fact that they were competent. They were based on the assumption that they were competent.

Mr. MOLUMBY: That is all.

Mr. BALDWIN: There is a question or two that I should have asked on cross examination, that I would like to ask now. A point I overlooked.

The COURT: Very well.

Recross Examination by Mr. Baldwin:

Digitalis is a medicine we use in treating the heart. As to whether it is a powerful heart stimulant, we don't rate it as a powerful heart stimulant. It is a medicine which controls the rhythm and rate of the heart.

Q. Now, we will assume that for a period of eighteen months after his discharge from the army, the plaintiff here, Carl F. Noble, used digitalis under the prescription of a pharmacist, and not after examination nor by direction nor under the authority of any licensed physician, considering that to be true, would it in anyway affect your conclusion in this case?

(Testimony of Doctor Alred.)

A. No sir.

Q. The use of digitalis for a period of eighteen months would not have any effect upon the heart action, or heart muscles?

A. Yes, it would have a marked effect upon the heart muscles. As to what that effect would be, it would have a tendency all during the period that he was taking digitalis, it would affect the rate, slowing it to a variable degree, depending upon the amount he took, and also the quality of the digitalis. The constant use of digitalis over that period of time would naturally have [247] an effect upon the heart and muscles if it was given in therapeutic or toxic doses. Therapeutic dose would be sufficient amount to cause a medical effect; a toxic dose would be a poisonous dose. The effect of any dose would be if continued over a period of eighteen months. A physician before prescribing that remedy would have to know the entire physical condition of his patient, at least he should. The giving of, or the use of digitalis might be a very effective agent in bringing about a heart condition.

Q. Now, Doctor, in view of those facts, would not the fact that Noble used digitalis without examination by a physician, and not under the direction of one licensed to practice medicine, use digitalis over a period of eighteen months, would not that have some bearing on the man's condition and your conclusion in this case?

A. You asked me if it would bring about heart effects, and I answered yes. It would not bring

(Testimony of Doctor Alred.)

about the effect in which I found his heart. As to what effect it would bring about, digitalis continued over a long period of time is capable of creating a heart flow, causing the heart to lose its regularity, and miss or drop beats. When it loses or drops beats, that is the nerve control of the heart. The heart is controlled by special nerves. As a matter of fact it has a special nerve center all its own, that controls its action independent of the other organs. Digitalis would have an effect upon the nerve control. The nerve control regulates the heart beat. As to whether digitalis might effect the heart control so that it might pick up a beat or drop a beat, I will say his heart is not skipping a heart beat. Using digitalis is not like laying a whip on the back of a tired horse, there is no resemblance between the two. Digitalis slows the heart down. [248]

Q. And the slowing down of the heart by the use of digitalis for a period of eighteen months, you think would have no effect upon the condition of the man?

A. Yes, it might have.

Q. Well, it could have, but you say in this case it didn't have?

A. No, I couldn't say that.

Q. Assuming then that it did cause, or that he took this digitalis over the period specified, eighteen months, it might have a bearing on your conclusion, would it not?

(Testimony of Doctor Alred.)

Mr. MOLUMBY: I object to that as repetition.

The COURT: He has already answered you once or twice.

Mr. BALDWIN: Note an exception.

WITNESS continuing: A man having the heart involvement that I say I found, would be in need of medical attention.

Q. Would not the fact that between July 30, 1919, when the plaintiff was discharged from the army, and the year 1923, he sought no medical advice and received no medical attention, have a bearing on his condition as you found it?

A. Well, it is in keeping with what I know about this case. It proves to me that at least he labored under the belief that he did have a heart ailment.

Q. Well, I am not dealing with your belief, I am dealing with your opinion on the facts found, and assuming the added fact that from the time he left the army until 1923, the plaintiff here sought no medical treatment.

Mr. MOLUMBY: We object to that, as not in evidence. The evidence was that he did take medicine, and that was given him in the hypothetical question stated to him.

Q. And assuming that there was a doctor available, wouldn't that in some way cause you to revise your conclusion as to what his [249] condition was during that period?

(Testimony of Doctor Alred.)

A. That was read to me. I knew that he had taken digitalis, and that he went through this period with a pharmacist prescribing some medicine. I was not aware that he had not sought medical advice from July 1919 to the year 1922?

Q. Wouldn't that indicate to you that the man's condition was not so serious that he could not carry on any substantially gainful employment?

A. No, that would not alter that, he was not occupied in a gainful occupation.

Q. It is not a question whether he was, the question that is presented here in my question is, wouldn't it affect your opinion as to his ability and power to carry on?

A. No, many people do not seek medical attention at all. The fluttering of the hands indicated a nervous condition.

Q. And can you tell what the condition of that nervous involvement was at the time stated, between July, 1919, and the year 1922?

A. No, not from my medical examination.

Q. If it was merely as marked as you found it, it would require medical corrections, would it not?

A. It would need medical attention.

Q. And these other conditions, if they existed in 1922, would be the same, would not they? They would require medical attention and correction?

A. They would need medical attention.

Q. And if that condition existed in 1922, by proper medical advice the condition might be remedied, might it not?

(Testimony of Doctor Alred.)

A. It could have been helped, I would assume.

Q. And if helped it might result in the plaintiff here being able to carry on a gainful employment, might it not? [250]

Mr. MOLUMBY: Objected to on the ground that it is purely speculative.

The COURT: Yes, I think so. Sustain the objection.

Q. What was there in the heart condition that prevented Mr. Noble from carrying on a gainful employment in 1922?

A. I stated about his heart involvement, palpitation, and pounding.

Q. That is what he told you?

A. That is what I was told in this statement.

Q. I am asking you from your observation, what conditions you found, from what you learned yourself?

The COURT: He has already said that he cannot go back of 1930. Why ask him that?

Witness excused.

PLAINTIFF RESTS.

Mr. BALDWIN: Defendant now moves that the case be dismissed on the following ground:

That the Government cannot, without its consent, be sued, and it has not consented to be sued in this action. That the court has no jurisdiction

of the person of the defendant. That the court has no jurisdiction of the subject of the action. That the complaint fails to state facts sufficient to constitute a cause of action. That it appears definitely from the complaint that no denial of any claim made by the plaintiff has ever been appealed to or decided by the administrator of the Veterans Administration; that it appears definitely from the proof of the plaintiff, made by the deposition of Carl F. Noble, the plaintiff here if it be credited, that the only decision upon which he bases his claim of right to sue is based upon an apparent judgment by the insurance claim counsel. That as a result of his [251] advice, failed to carry his claim to a conclusion, and to avail himself of all remedies within the Veterans Administration. He has failed to place himself in a position where he has a right to sue the Government, or maintain an action in this court.

On the further ground that it appears definitely from the proof put in by plaintiff, that there is a material variance between the claim on which he bases his right to sue here, and to recovery, if recovery be allowed, and the claim as stated in this complaint in this action.

Defendant now moves that the court direct a verdict for the defendant in this case on the grounds stated in its motion that the action be dismissed, and on the added ground that by its complaint, or by his complaint, the plaintiff has limited himself to a specified day, July 30, 1919, the date of his

discharge from the army, and his claim for disability, as proven by him, relates to a later date.

The COURT: Overruled.

Mr. BALDWIN: We will ask an exception.

The COURT: Is there any variance in the proof, and your allegation?

Mr. MOLUMBY: In this respect only. The allegation of the complaint is that the director of the Veterans Bureau, and the Bureau of War Risk Insurance, by recent Act of Congress has changed their name, and call it The Veterans Administration.

The COURT: Isn't that the way it was when the complaint was filed?

Mr. BALDWIN: Yes.

Mr. MOLUMBY: I think they changed the name prior to the filing of this complaint. I would ask leave to amend the allegation of the complaint, to add, on page 3, line 1, after the words "Bureau of War Risk Insurance" the following words, "And the Veterans [252] Administration." In line 6 before the words, or the word "Insurance" by adding the words "And Veterans Administration", and after the word "Directors" add the words "And Administrators". I would ask leave to amend that.

The COURT: I will allow the amendment. Call in the Jury.

Mr. BALDWIN: Note an exception.

DEFENDANT'S CASE

Whereupon Mr. Brown made opening statement to the Jury.

Mr. MOLUMBY: We ask that the record show, that the deposition which is about to be presented

by Counsel has been opened prior to this session of court, and prior to the beginning of the hearing of this case, and is now open.

The COURT: What are the circumstances?

Mr. MOLUMBY: There was no Counsel present representing the Defendant.

Mr. BROWN: I noticed that it was served. They didn't see fit to be present at that hearing. The United States was represented by a Deputy United States Attorney.

The COURT: Where was it taken?

Mr. BROWN: It was taken in Portland, Oregon, and it was then, as I understand it, sent by the Notary Public, who took it, and mailed to the Clerk of the Court.

Clerk of the Court WALKER: No.

The COURT: We will have to conduct some inquiry, how it got here, and how it happened to be opened, and who opened it.

Mr. BROWN: Are you sure that it was not sent to the Clerk of the Court?

Clerk of the Court WALKER: It was sent here by The United States Attorney. We have the envelope that it came in.

Mr. BROWN: Was the envelope sealed [253] or unsealed?

Clerk of the Court WALKER: This envelope was sealed. That was in it. We have nothing to show from the envelope that it was a deposition.

The COURT: I know what the law is, on the subject. The United States Attorney, or Deputy,

representing the Government at the taking of this deposition, had no right to take the deposition and mail it to anybody.

Mr. BROWN: I don't know that he did.

The COURT: If it was mailed by the officer who took the deposition, it should have been noted on the outside of the envelope, what it was, so that the Clerk would know, and not open it by mistake. I don't understand how it got away from the Notary Public or the Officer taking the deposition, how it happened that he did not take care of it himself. You can look into the water, and we will take it up at one thirty p. m.

Whereupon the hearing was continued until one thirty o'clock P. M., Thursday, October 31, 1924.

Thursday afternoon, October 31, 1924.

Whereupon

J. H. BALDWIN,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Brown:

My name is James H. Baldwin. I reside in Butte, Montana. My profession is that of an Attorney at Law. I am at present the United States Attorney for the district of Montana. I was appointed January 2 this year, first without the confirmation of the Senate and later by Senatorial confirmation. At the time that I took over that office, there was a cause pending in this court, No. 895, Carl F. Noble, Plain-

(Testimony of J. H. Baldwin.)

tiff, vs. United States of America. After I took over the office, and prior to this term of Court, [254] I did work on the preparation of that case for trial, to the best of my ability.

Q. And in the course of that preparation for trial, what have you to say as to whether or not you believed, in your judgment, it was necessary that the deposition of Dr. Smith, who was not residing in the State of Montana, be taken?

A. I did after conference with Francis J. McGan, the attorney in charge of these particular cases. Steps were then taken to take the deposition of Dr. Smith.

Mr. BROWN: I will ask that this deposition be marked for identification purposes as Defendant's Exhibit 4.

Whereupon deposition was marked Defendant's Exhibit 4.

WITNESS continuing: Having been handed the paper marked Defendant's Exhibit 4, the names appended thereto are: James H. Baldwin, I signed my signature; Mr. Francis J. McGan, signed his in my presence.

Q. Subsequently then there was the statutory notice of the time and place of taking the deposition, with the name of the witness whose deposition was to be taken?

A. Yes, that was the notice we gave of the taking of the deposition of Dr. Smith, I believe, this year. Also the time and place that that deposition would

(Testimony of J. H. Baldwin.)

be taken. I also sent attached to it an affidavit of service on the attorneys for the Plaintiff, Messrs. Molumby, Busha & Greenan.

Q. And thereafter, and after the date of this notice, which was dated at Butte, Montana, on the 21st day of September, 1934, Mr. Baldwin, what occurred after that. Did you have anything to do after that with the taking of the deposition?

A. Not with the taking. It was referred to Mr. Meindl, I believe, the Attorney for the Department of Justice, at the place of the [255] taking of the deposition, which I believe was Portland. He handled the taking of the deposition himself on behalf of the United States at the request of Mr. McGan and myself.

Q. I will ask you whether or not in this case, and in all cases it is the practice of the United States Attorney, required by the rules of the Attorney General, that office files be kept of all these cases.

A. That is the rule and we obey it as fully as we can. I kept an office file in this Noble case, in conjunction with the other people in my office, the clerks and the assistants in my office. I have that office file with me.

Q. And is there anything in that office file that you had with you by which you can tell whether or not this deposition that I have had marked Defendant's Exhibit No. 4, came into the United States Attorney's office at Butte?

(Testimony of J. H. Baldwin.)

A. I have a letter that indicates it. Having been handed Defendant's Exhibit No. 5, that is the letter that I referred to as indicating that it did come into my office. That is the letter I received addressed to the United States Attorney, Federal Building, Butte, Montana. As to whether I have any other letter in the file that indicates other than this one, that the deposition did come into my office, I have a letter that I sent to Mr. Dill in response to that letter. That is a carbon copy made at the same time as the original. That document that I have just referred to has been marked Defendant's Exhibit No. 6. The carbon copy, and identical with the original, except on the original my name was written in, James H. Baldwin, not appearing upon the copy. That is the only correspondence that leads me to believe that this came into my office. That is the only correspondence that I have, excepting a letter from Mr. Meindl [256] in which he states "I understand that the Notary Public is mailing the original in the above case to the Clerk of the Court at Great Falls, and will mail the original in the other case tomorrow.

Mr. BROWN: We offer Defendant's Exhibit No. 5 in evidence.

Mr. MOLUMBY: No objection.

Whereupon Defendant's Exhibit No. 5 was received in evidence without objection, and is in words and figures as follows, to-wit:

(Testimony of J. H. Baldwin.)

DEFENDANT'S EXHIBIT NO. 5.

STATE BANK OF MORTON

Morton, Washington.

October 8, 1934.

United States Attorney,
Federal Building,
Butte, Montana.

Dear Sir:

Enclosed you will find original deposition in the case of Carl F. Noble vs. United States. #895—Great Falls Division.

Kindly forward witness fee form and also voucher for myself.

Very truly yours,

ROSS DILL.

Ross Dill

Filed Nov. 1, 1934.

GARLOW, Clerk.

C. G. Kegel,

Deputy Officer.

Mr. MOLUMBY: No objection to Defendant's Exhibit No. 6.

Mr. BROWN: Exhibit No. 6 is dated Butte, Montana, October 11, 1934.

Whereupon Defendant's Exhibit 6 was received in evidence, without objection, and is in words and figures as follows, to-wit:

(Testimony of J. H. Baldwin.)

DEFENDANT'S EXHIBIT NO. 6.

Butte, Montana,
October 11, 1934.

Ross Dill,
c/o State Bank of Morton [257]
Morton, Washington

Re: Great Falls, Montana Division
Civil cause No. 895;
Carl F. Noble v. U. S.

Dear Sir:

This will acknowledge receipt of your letter of October 8, 1934, with enclosures, all relating to the above-entitled matter.

These papers have been referred to Mr. Francis J. McGan, Attorney, Department of Justice, Federal Building, Butte, Montana, for attention.

Very truly yours,

JAMES H. BALDWIN

United States Attorney for the
District of Montana.

JHB*MP

cc-McGan (Enc)

Filed Nov. 1-1934-Garlow, Clerk.

By C. G. Kegel-Deputy Officer.

(Testimony of J. H. Baldwin.)

Mr. BROWN: And the stenographer's notation on there that enclosure had been made.

Q. After this deposition was received in The United States Attorney's office, do you know what then was done with it?

A. Well, the letter indicates that it was referred to Mr. McGan and I believe, I am not positive of that, that I handed it to him personally. I will say in that connection that there is nothing in the file that shows a transmission of a letter to Mr. McGan, but under the office practice a copy of every letter that I send out, or anyone in my office, also the original of every letter is supposed to be in this file. I noticed that that letter is dated October 11, this year, and if the matter had been mailed to Mr. McGan there would not be in this file a copy of the letter of [258] transmission. I do not find such a letter in the files. The practice in the office is this, when letters are dictated, the copy goes to what we call the filing basket, and under the rules of the office they must be cleared at least every other day under every condition. We left for Great Falls on October 15th. I believe that Court opened on the 16th, did it not?

Q. Yes.

A. We left at eight o'clock in the morning on the 15th for Great Falls, but I think it is fair to assume that if I had sent a letter to Mr. McGan it would be in this file.

(Testimony of J. H. Baldwin.)

Q. Now, Mr. Baldwin, if that deposition was mailed, so far as you know, out of the United States Attorney's office to Great Falls, or as far as you know was it mailed out of the United States Attorneys office in exactly the same condition as it was when it came into the office?

A. It certainly would not have been changed in our office.

Q. At Mr. Molumby's suggestion I will put this further question. You were present in Court this morning when the deposition was produced by the Clerk of the Court?

A. I was, yes.

Q. So that as far as you know, it was mailed out of the United States Attorney's office and got into the hands of the Clerk in some fashion.

A. I cannot swear that it was mailed out of my office; it must have been mailed either out of my office or Mr. McGans. When the deposition was wanted for use I requested Mr. Harry H. Walker, then the Clerk in attendance upon the court here, to give me the deposition of the Dr. mentioned in it. He handed me the deposition on which appears a filing mark here October 11, 1934. It is the deposition referred to. It was not enclosed in an envelope, [259] but was in the condition that it appears now.

Mr. MOLUMBY: No cross examination.

Witness Excused.

Whereupon

CONRAD G. KEGEL,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Baldwin:

My name is Conrad G. Kegel. I live in Great Falls, Montana. I am more than twenty-one years of age. I occupy the official position of Deputy Clerk of the United States Court at Great Falls, Montana. I have held that position all this year. Having had my attention called to a paper marked in this case as Defendant's Exhibit 4, and bearing file mark, filed October 11, 1934, C. R. Garlow, by myself, I will say that I have seen that paper before. The circumstances under which I saw it, this Document was received by me as Deputy Clerk on October 11, 1934, through the mail from Butte, Montana. I received it in Great Falls, Montana. I think the envelope in which it was enclosed is in the file there.

Mr. BALDWIN: I will ask that it be marked as Defendant's Exhibit No. 7.

Whereupon said paper was marked Defendant's Exhibit No. 7.

WITNESS continuing: Having had my attention called to a paper marked here as Defendant's Exhibit No. 7, being an envelope, that is the envelope in which I received it.

Q. At the time you received it, did you make any note upon it, or attach a note to it?

(Testimony of Conrad G. Kegel.)

A. I didn't exactly attach this note to it at the time that I received it.

Q. Well, did you make a note for reference?

A. I made a note for reference. The note is my handwriting made at that time. I recall the circumstances without referring to [260] the note. On the morning of October 11, 1934, I called for the mail; brought it up to the office, and included in that mail was this envelope, containing this deposition. Of course, I did not know that it contained a deposition at the time. It looked like ordinary mail. I opened it up and found this deposition in it, so that I made this notation on it.

Mr. MOLUMBY: No cross examination.

Mr. BALDWIN: We now offer the Exhibit in evidence, the envelope itself. It has a paper attached that we are not offering.

Mr. MOLUMBY: We have no objection to the envelope.

The COURT: It may be received in evidence.

Whereupon Defendant's Exhibit No. 7, was received in evidence without objection, and is in words and figures as follows to-wit:

(Testimony of Conrad G. Kegel.)

DEFENDANT'S EXHIBIT No. 7

(Stamp)—Butte, Oct. 9-1934.

Department of Justice.

Official Business

District of Montana
Office of, United
States Attorney,
Butte, Montana.

C. G. Kegel
Deputy Clerk
U. S. District Court
Great Falls, Montana.

Filed, Nov. 1-1934. C. R. Garlow-Clerk

By C. G. Kegel-Deputy Clerk.

This deposition received from U. S. Attorney's office on Oct. 11-1934, regular mail.

Envelope not marked on outside, and therefore opened as regular mail.

C. G. Kegel

#895.

[261]

Witness Excused.

Whereupon

J. H. BALDWIN

was recalled as a witness on behalf of the Defendant, and testified as follows:

Direct Examination by Mr. Brown:

Q. Mr. Baldwin, I will ask when the deposition was sent to your office if you recall whether or not

(Testimony of J. H. Baldwin.)

there were any markings on the envelope to distinguish the character of the instrument that was inside of it?

A. There were not. If I had known it was a deposition I never would have opened it. It was merely addressed to the United States Attorney, Butte Montana, and I opened it. It came in the ordinary business envelope with other mail, in the usual course of mail with nothing to indicate what the content was. I opened it as part of the ordinary course of opening mail that morning, just as I would any other mail.

Witness Excused.

Whereupon

LOY J. MOLUMBY,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Baldwin:

My name is Loy J. Molumby, I am an attorney duly licensed to practice. I have practiced in all of the courts of the State of Montana, and the Federal Courts in this State since 1915, but I don't recall the exact date. I have at all times during the pendency of the case now on trial been one of the attorneys for the Plaintiff therein. As such attorney I saw the deposition that is marked in this case as

(Testimony of Loy J. Molumby.)

Defendant's Exhibit No. 4 before today. I am not sure when I first did see that deposition, it was before the case started however, and I knew that it was then out of any envelope. I did not read it entirely, I glanced at it. I did not call it to the attention of the United States [262] Attorney's office, yourself, Mr. Brown or Mr. McGan, at any time. I was not taken by surprise when I discovered this morning when you wished to use that paper that it had not been transmitted according to the strict laws, or rules of law.

Q. And you had knowledge of that fact prior to the commencement of the trial of this case?

A. I acquired the knowledge either the morning that this case started, or the morning one of the other cases we have just tried started. I don't remember which it was.

Q. Can you suggest any reason at this time why the rights of your client would be prejudiced by the use of that deposition?

A. Yes.

Q. Because of any defect in transmission?

A. Yes, there are a good many reasons.

Q. What are they?

A. The man was not present, nor had any representative at the time that the deposition was taken. He has no knowledge that it is in the same condition it was in when it was taken. The further disadvantage he is placed at, it gives the opposition an opportunity to go over the deposition if it is opened.

(Testimony of Loy J. Molumby.)

Q. You had that same opportunity, didn't you?

A. No sir, it is not my deposition.

Q. Well, a deposition is taken for use by either party.

A. If it was going to be used by us, was taken by us for our purposes, we would have been there to represent him, if possible.

Witness Excused.

Mr. BALDWIN: We admit that the strict letter of the law has not been complied with. It is only the question of whether it is in conformity with section 9,191 of our Montana codes which control here.

[263]

Mr. MOLUMBY: I will state that the notice served upon Counsel specifically recites that the examination of said witness will be had, and said deposition taken under and in accordance with the provisions of Sections 639, 640, 641, Title 28, U. S. C. A. That is the section of our code which provides that it must be delivered in open court and opened there.

The COURT: I will have to sustain the objection.

Defendant's Exhibit No. 4, to which objection was sustained, is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. 4.

[Title of Court and Cause.]

NOTICE OF TAKING DEPOSITION
UNDER THE STATUTE.

TO: Carl F. Noble, Plaintiff above named, and to
Molumby, Busha & Greenan, Great Falls, Mon-
tana, Attorneys for said Plaintiff:

YOU WILL PLEASE TAKE NOTICE, that the deposition of Dr. Robert P. Smith, Medical and Dental Building, Portland, Oregon, a witness on behalf of the Defendant in the above-entitled cause, to be used upon the trial thereof, will be taken before Kenneth Frazer, U. S. Court House, Portland, Oregon, a notary public, or any notary public, in and for the County of Multnomah, State of Oregon, at his office at the U. S. Court House, in the City of Portland, County of Multnomah, State of Oregon, who is not, and never has been, of counsel or attorney to either of the parties to said action nor interested in the event of said cause, [264] on the 8th day of October A. D., 1934, between the hours of 10:00 o'clock A. M., and 4:00 o'clock P. M., of that day, commencing at 10:00 o'clock A. M., and if not completed on that day, the taking thereof will be continued from day to day successively thereafter and over holidays at the place so indicated until completed.

The reason for taking said deposition is that said witness is a material witness for the Defendant and that said witness resides in the City of Portland, State of Oregon, more than one hundred miles from

the place where the above-entitled cause is to be tried, to-wit: Great Falls, Cascade County, Montana.

The examination of said witness will be had and said deposition taken under and in accordance with the provisions of Sections 639, 640, and 641, Title 28, U. S. C. A.

Dated at Butte, Montana, this 21 day of September, 1934.

JAMES H. BALDWIN,
United States Attorney,
District of Montana.
FRANCIS J. MCGAN,
Attorney,
Department of Justice.

[Title of Court and Cause.]

Audrey Varcoe, being first duly sworn on oath deposes and says: that she, a citizen of the United States and a resident of the State of Montana, and is over the age of eighteen years, and not a party to or interested in the above-entitled action; that [265] she served a copy of the NOTICE OF TAKING DEPOSITION UNDER THE STATUTE— in the above-entitled cause on Carl F. Noble, through his Attorneys, Mohunby, Busha & Greenan, Great Falls, Montana, Plaintiff herein, by depositing in the United States Post Office at Butte, Montana, on the 21st day of September, 1934, said copy securely sealed in an envelope addressed to Mohunby, Busha & Greenan, Attorneys at Law, 325 Ford Building, Great Falls, Montana, and sent

under the Government frank, being the official frank of the United States Attorney for the District of Montana, no postage thereon being required; that the said Butte, Montana is the place of mailing of the said Notice of taking Deposition Under the Statute, that on the said date there was a regular communication by United States mail between said Butte, Montana and said Great Falls, Montana.

AUDREY VARCOE.

Subscribed and sworn to before me this 21st day of September, 1934.

HAROLD L. ALLEN,
Deputy Clerk, U. S. District Court,
District of Montana.

[Title of Court and Cause.]

DEPOSITION OF DR. ROBERT P. SMITH.

BE IT REMEMBERED: That pursuant to notice hereto attached, the matter of taking the deposition of Dr. Robert P. Smith, [266] a witness, on behalf of the Defendant, came on for hearing Monday, October 8, 1934, before Kenneth F. Frazer, Notary Public for Oregon; the defendant appearing by Gerald J. Meindl, Attorney, Department of Justice, the plaintiff not appearing.

DR. ROBERT P. SMITH,
being first duly sworn, testified as follows:

Questions by Mr. Meindl.

Please state your name.

A. Robert P. Smith.

(Deposition of Dr. Robert P. Smith.)

Q. Where do you live?

A. In Portland, Oregon.

Q. What is your profession?

A. I am a physician.

Q. What school or schools are you a graduate of?

A. I am a graduate of the University of Maryland, Johns Hopkins, medical school, and University of Pennsylvania, Philadelphia.

Q. In what years did you graduate?

A. I graduated in 1891, University of Maryland; in 1900, Johns Hopkins medical school, and 1901, post graduate, University of Pennsylvania.

Q. Have you specialized in any branch or branches of your profession?

A. I have.

Q. What branches have you specialized in?

A. Nervous and mental diseases.

Q. Have you studied in any special school?

A. In my specialty I was a post graduate of University of Pennsylvania, and I taught nervous and mental diseases at the Baltimore medical school for 1901 to 1909, when I moved to Seattle, Washington. [267]

Q. Doctor, are you a member of any medical society in connection with your specialty?

A. I am.

Q. Of what society are you a member?

A. I am an honor member of the American Psychiatric association, which is termed a fellow.

Q. Doctor, I hand you a document and ask you if your signature appears thereon?

A. It does.

(Deposition of Dr. Robert P. Smith.)

Q. What is that, Doctor?

A. That is an examination on Carl F. Noble, dated December 10, 1925.

Q. Do you remember Carl F. Noble, the plaintiff in this action?

A. Perfectly.

Q. Do you recall making that examination, Doctor?

A. I do.

Q. Doctor, using this examination report to refresh your memory along with your remembrance of the examination which you made of Carl F. Noble, will you state the type of examination you gave him?

A. I gave him a complete nervous and mental examination on the date specified.

Q. What date is that?

A. December 10th, 1925, in the City of Helena.

Q. Doctor, would you go into detail, and explain just how you made that examination. Did you make any tests?

A. His heart; and to stand with his eyes closed. Next were the reactions of his pupils. Thirdly, for tremors of eyelids, facial muscles, or extended fingers. And the next looked for was any atrophy or inco-ordination that might be found. Then his circulat- [268] ion termed as a vasomotor, which is the circulatory condition, was tested; then reflexes, both superficial and deep, were tested in order to determine any nervous condition that might be present.

Q. What were the results; what were your findings?

(Deposition of Dr. Robert P. Smith.)

A. My diagnosis was neuro, circulatory asthenia, with 20 per cent temporary disability, existing at that time, which was based on his complaints made on December 10th, 1925, plus a chronic myocarditis that the physical examiner had reported to me.

Q. Doctor, would you explain what neuro circulatory asthenia is, in ordinary terms?

A. That means disturbance of the circulation due to a nervous condition.

Q. Doctor, using the following definition as the basis for your answer, that is, any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, as being total disability; and that a total disability shall be deemed to be permanent disability whenever it is founded upon conditions which render it reasonably certain to continue throughout the life of the person suffering from it, using the above definition for the term of permanent and total disability, would you state whether or not in your opinion, that Carl F. Noble was permanently and totally disabled on December 10, 1925, at the time of your examination?

A. He was not.

Q. Will you explain why you say he was not permanently and totally disabled at that time?

A. Because the only disability that he had was a mild chronic heart trouble, with a nervous disturbance of circulation, which [269] placed him with the combined disabilities, as 45 per cent partially disabled.

(Deposition of Dr. Robert P. Smith.)

Q. Doctor, I now hand you a document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document, Doctor?

A. That is a special nervous and mental report made on Carl F. Noble in the City of Helena, Montana, on December 12th, 1927.

Q. Doctor, using that report to refresh your memory, in what condition was the veteran on that day, in other words, what were your findings at that time?

A. My findings were the same as on the previous examination dated December 10, 1925; medically his disability was exactly the same that had been found on the previous examination. The only difference noted in this report is that he was then showing what term pre-senility, which means he looks much older than his years would indicate.

Q. Did you make the same type of examination December 12th, 1927 as you had December 10th, 1925?

A. Almost exactly the same type of examination.

Q. Doctor, I hand you another document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document, Doctor?

A. That is an examination made and signed by a board of three, of which I was a member, on Carl F. Noble, in the City of Helena, dated February 13th, 1929.

(Deposition of Dr. Robert P. Smith.)

Q. Did you make the same type of examination on February 13, 1929 as you had on your two previous examinations?

A. I did. [270]

Q. And what were your findings on February 13, 1929?

A. The only difference noted is that there was a slight increase in tremors of his extended fingers. Otherwise his previous nervous condition that had been reported under date of December 10th, 1925, and December 12th, 1927, had improved.

Q. Had improved?

A. Had improved.

Q. Doctor, was a report made to you of the veteran's heart condition at that time?

A. There was.

Q. What were your findings?

A. Chronic myocarditis mild, with a disability recommended by the physical examiner as fifteen per cent.

Q. Doctor, using the definition which I have already given you as permanent and total disability, in your opinion was Carl F. Noble permanently and totally disabled at the date of your examination of February 13, 1929?

A. He was not. And was advised that medically his condition was stationary, and that another examination would be unnecessary.

Q. Doctor, did you, or did you not, on or about February 10, 1930, examine this veteran again?

A. I did.

(Deposition of Dr. Robert P. Smith.)

Q. What were your findings on that examination?

A. This examination was made at the U. S. Veterans hospital, Fort Harrison, Montana, February 10, 1930.

Q. What were your findings, Doctor?

A. My findings were asthenia, neuro circulatory, moderate, based on a few remaining nervous symptoms, plus the presence of a mild myocarditis, plus the fact that my notes read as follows: [271] "Claimant has been examined several times by the present examiner, and he is far more stable than heretofore seen."

Q. Does that indicate an improvement in 1930, Doctor?

A. It does.

Q. Is that improvement both in the heart condition and asthenia?

A. It has taken into consideration the entire disability of the man in making my recommendation.

Q. Doctor, I will hand you another document, and ask you if your signature appears thereon?

A. It does.

Q. What is that document?

A. That is an examination of Carl F. Noble made at the U. S. Veterans hospital 72, at Fort Harrison, April 21st, 1930.

Q. What were your findings on April 21st, 1930, Doctor?

A. Asthenia, neuro circulatory, with the following remarks pertaining thereto; this claimant is service connected on asthenia and neuro circulatory

(Deposition of Dr. Robert P. Smith.)

which is perpetuated, but symptoms scarcely seem justifiable at this time in such diagnosis.

Q. Referring back to the examination of February 10, 1930, I will ask you if an exercise test was given the veteran?

A. It was.

Q. What was the result of that exercise test?

A. Showed improvement with very slight deviation from a normal exercise test.

Q. Doctor, using the term of permanent and total disability which I gave you, again, on April 21st, 1930, was this veteran in your opinion permanently and totally disabled?

A. In my opinion this veteran has a permanent partial disability, but I have never seen him when I thought his condition was permanently total. [272]

Q. That is true on all these different times you examined him?

A. All five examinations; and those made in the latter years were showing a steady but gradual improvement.

Q. Doctor, you are familiar with various occupations and vocations are you not?

A. Yes.

Q. Could you name some types of work this veteran could do without physical detriment to himself?

A. I think this veteran can do any work of which he is educationally capable of performing, and any nature of work except severe physical labor, as such labor might increase his heart condition.

(Deposition of Dr. Robert P. Smith.)

Q. Doctor, during this examination have you based your testimony upon your own remembrance of this man, as well as the reports which you have been given here, which you signed?

A. I remember Carl F. Noble very well, but it wouldn't be humanly possible for me to have gone into details on my remembrance of the man without the assistance of my signed reports you gave me.

ROBERT P. SMITH, M. D.

In the District Court of the United States for the
District of Montana. Great Falls Division.

No. 895

CARL F. NOBLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

OFFICERS CERTIFICATE

State of Oregon,
County of Multnomah.—ss.

I, Kenneth F. Frazer, Notary Public for Oregon, [273] hereby certify: that pursuant to notice hereto attached to take the deposition of Dr. Robert P. Smith, a witness on behalf of Defendant, said matter came on before me Monday October 8, 1934, 10 o'clock a. m., at my office, 512 U. S. Court House, Portland, Oregon, the defendant appearing by

Gerald J. Meindl, Attorney, Department of Justice, the plaintiff making no appearance; that before said witness was allowed to testify he was by me duly sworn; that said deposition was reduced to writing in my presence and under my direction; that thereafter said deposition consisting of the foregoing typewritten pages numbered one to seven, inclusive, was carefully read over by said witness, and by him subscribed in my presence.

In Witness Whereof, I have hereunto set my hand, and affixed my notarial seal this 9th day of October, 1934.

KENNETH F. FRAZER,
Notary Public for Oregon.

My commission expires May 4, 1938.

Filed October 11, 1934.

C. R. GARLOW, Clerk.
C. G. Kegel, Deputy.

Whereupon

JOHN B. SULLIVAN,

a witness called and sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Brown:

My name is John B. Sullivan. I reside in Lewistown, Montana. My business or occupation at present is that of a National Bank Receiver. As such I am in charge as receiver of the books and the papers of the National Bank of Grass Range, Montana. It is in my hands as a receiver.

(Testimony of John B. Sullivan.)

Q. I will hand you a document marked Defendant's Exhibit 8, consisting of a number of sheets, and ask you what they are. [274]

A. They are the daily ledger sheets of an account in the bank, between June 11, 1922, and July 1st, 1930, standing in the name of Carl F. Noble, and they show deposits made from day to day, and withdrawals from day to day, and the balances remaining from day to day on that account. I have made a computation which shows the total amount of money that was deposited in that account from July, 1923, until July, 1930.

Q. And will you tell us Mr. Sullivan, the amount of money that was deposited between those dates in the account of Carl F. Noble in that bank.

Mr. MOLUMBY: Just a moment. To which we object on the grounds and for the reason that it is incompetent, irrelevant, and immaterial, tends to prove no issue whatever in this case; nothing to be shown that these deposits were made by the efforts of the plaintiff which is the only issue raised by the pleadings. The fact that the money may be deposited in an account in his name would not indicate in any way it was earned by him. It does not indicate that it came from his efforts or labor, or anything of that kind. It is material to no issue whatever in this case.

The COURT: Overrule the objection. Proceed.

A. To give this total I would have to rearrange the figures because you asked for the total from July, 1923, when the balance begins July 11, 1922, so that you will reframe your question.

(Testimony of John B. Sullivan.)

Q. I will ask you the question from June 11, 1922, until July 5th of 1930.

Mr. MOLUMBY: May we have our same objection to this question?

The COURT: Yes.

Mr. MOLUMBY: Note an exception.

A. The total shows that there was deposited between July 17, 1922, in The First National Bank of Grass Range, Montana and including [275] July 5, 1930, the sum of \$22,082.23.

Mr. BROWN: We will offer at this time Defendant's Exhibit No. 8, if the court please, and ask that a copy may be made and the original returned to Mr. Sullivan.

The COURT: Very well.

Mr. MOLUMBY: To which we desire to object on the grounds that we have just stated in our previous objection.

The COURT: It may be admitted, and copy substituted.

Mr. MOLUMBY: We would like to have an exception.

(Defendant's Exhibit 8 shows total deposit of \$22,082.23 from July 17th, 1922, in the First National Bank of Grass Range, Montana, up to and including July 5, 1930, and that on said date, July 5, 1930, there was a balance in the Bank of \$142.44.)

Cross Examination by Mr. Molumby:

Q. Doctor, you know that it is the account of Carl F. Noble, the Plaintiff in this case?

A. I don't know the plaintiff in this case.

(Testimony of John B. Sullivan.)

Q. By the way, you are a Doctor, are you not?

A. I am a Doctor, yes. I don't know anything at all about where these deposits came from. I don't know whether they were actually deposited by one Carl F. Noble. I do not know that Carl F. Noble was physically there in Grass Range, or in that vicinity on any of the dates on which these deposits were made. I am not acquainted at all with Carl Noble, I don't know the gentleman. I was not with the bank in any capacity whatever at the date mentioned.

Mr. MOLUMBY: In view of the testimony, your honor, of the Doctor, that he did not know Carl Noble, who is the plaintiff in the case, and that this has reference to an account of the plaintiff, we move that the evidence of the Doctor be stricken [276] with reference to it, and with reference to Defendant's Exhibit 8, and that Defendant's Exhibit 8 also be stricken, and that the jury be admonished not to consider it.

Mr. BALDWIN: Not a doubt in the world that Carl F. Noble lived there.

Mr. MOLUMBY: There is testimony that he was away a great deal of that time.

Mr. BALDWIN: Yes, I made a deposit in my bank yesterday in Butte, and I am in Great Falls.

The COURT: It appears in evidence that he did business at this bank. I will overrule the objection.

DEFENDANT RESTS.

Mr. MOLUMBY: There is one matter that I would like to offer rebuttal on, but we are in an unfortunate situation. The Witness Harry Hillstrand who heretofore testified, a brother in law of Mr. Hillstrand, is being buried this afternoon. He is coming back, and if we could adjourn for a while, we could use him.

The COURT: We will stand in recess for a while, and just as soon as he comes in, notify me, so that we can proceed.

Whereupon a recess was had.

AFTER RECESS.

Mr. MOLUMBY: The record may show that the plaintiff also rests.

BOTH REST.

Mr. BALDWIN: Defendant now moves that this action be dismissed on the grounds stated in its motion at the close of Plaintiff's case. I take it the record may show by agreement of Counsel and with the consent of the court, that the grounds are inserted here, and not reported.

Mr. MOLUMBY: It is so stipulated. [277]

Mr. BALDWIN: The defendant now moves that the court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the plaintiff's case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

Mr. MOLUMBY: Yes, it is so stipulated.

Mr. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on the added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes within which to prepare, serve, and file our Bill of Exceptions.

Mr. MOLUMBY: That is agreeable.

The COURT: Ninety days granted.

Mr. BALDWIN: I will ask that the record so show by the agreement of Counsel expressed in open court.

Thereupon, defendant's requested instructions Nos. 1, 7, 9, 10, 14, 15, 19, 20, 21 and 22, which had been reduced to writing and numbered by defendant's attorneys, together with a written request asking the same, signed by said attorneys, were delivered to the court.

That thereafter, the Court instructed the jury as follows:

INSTRUCTIONS OF COURT.

The COURT: Gentlemen, you have heard the evidence, and the arguments of Counsel for the respective parties, and again it becomes the duty of the court to advise you as to the rules of law that you are to apply in your interpretation of the evidence. [278]

You are the sole judges of the facts, which you are to apply to the facts, in order that you may readily reach a verdict. In this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his complaint by a preponderance of the evidence. The plaintiff is not bound to prove his case beyond a reasonable doubt, as in criminal cases but is required to prove it by the preponderance of the evidence. This preponderance is not alone determined by the number of the witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury shall take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified; their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties. The apparent consistency fairness and congruity of the evidence, the probability or improbability of the truth of their several statements, in view of all the other

evidence in the case, and from all these facts determine upon which side is the weight or preponderance of the evidence. If you believe then any witnesses who have testified in this case knowingly and wilfully testified falsely concerning any matter or fact material to the elements of the cause of action herein, as defined in these instructions, his or her testimony is to be distrusted by you as to all other matters and facts to which he or she testified. You may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law, if his testimony is reasonable and consistent with all the other circumstances proven bearing upon the material issues involved in this case. The usual modes of [279] impeachment of a witness known to the law, as mentioned in the preceding instructions are first, by proving contradictory statements previously made by the witness as to matters relative to his testimony in the case.

Second; By disproving facts testified to by him.

And Third: By evidence as to his general bad character, but whether a witness has been impeached is solely for the Jury to determine from all the evidence in the case.

You are instructed that it is admitted by the parties, plaintiff and defendant in this action, that at all times mentioned in the Complaint the plaintiff was a citizen of the United States and a resident of the State of Montana; that he enlisted in the armed forces of the United States on September

20, 1919, and served the defendant from that date down to and including the 30th day of July, 1919, when he was discharged from the army. That between said dates plaintiff made application for insurance under the provisions of Article 4 of the War Risk Insurance Act of Congress, and the Rules and Regulations of the War Risk Bureau established by said Act in the sum of ten thousand dollars and that thereafter there was duly issued to plaintiff by said War Risk Insurance Bureau a Certificate of his compliance with the War Risk Insurance Act, so as to entitle him to the benefits of said Act, and the other Acts of Congress relating thereto, and the Rules and Regulations promulgated by the War Risk Insurance Bureau and the Veterans Bureau and the Director thereof, and that during the time of his service in said Army there was deducted from his pay for said premiums by the United States Government, through its proper officers the monthly insurance premiums provided by said Act, and the Rules and Regulations promulgated by the War Risk Insurance Bureau, [280] the Veterans Bureau and the Director thereof; that on January 22, 1931, plaintiff made application to the United States Government through the Veterans Bureau, and the director thereof; and the Bureau of War Risk Insurance and the director thereof; the Veterans Administration and the director thereof, for the payment of said insurance and for the monthly payments claimed to be due under the provisions of said War Risk Insurance Act for total permanent disability.

In his complaint plaintiff claims that during the period of his service in the War with Germany and its allies and on and between September 20, 1917, and July 30, 1919, and while said insurance was in full force and effect the plaintiff contracted certain diseases and disabilities and suffered certain injuries which said diseases, injuries and disabilities have continued since the date of his discharge from the defendant's army, July 30, 1919, rendered and still does render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases and disabilities and injuries are of such a nature and founded upon such conditions that it is reasonable to suppose and believe that it will continue throughout the life of the plaintiff to render the plaintiff unable to follow any substantially gainful employment. The defendant denies each of these allegations and as a result of that denial the burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence that these allegations are true and if it does not appear to your satisfaction by a preponderance of the evidence in this case that these allegations are true, your verdict must be for the defendant.

Plaintiff's claim in this case is based upon a contract of insurance entered into by and between him and the defendant,— [281] the United States of America, under which it promised and agreed to pay to him a specified sum in monthly installments in the event that he died or became totally and permanently disabled during the life of the policy. The

action is purely one on contract and the burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence in this case that at some time prior to July 30, 1919, he became totally and permanently disabled.

Permanent partial disability is not sufficient to justify a verdict for the party suing upon a war risk insurance contract.

It cannot be said that injury or disease, sufficient merely to prevent one from again doing work of the kind he had been accustomed to perform, constitutes the disability meant by the war risk insurance Act, and though it may appear to you by a preponderance of the evidence in this case that the plaintiff is not able to do the work that he did or to follow the occupation that he followed prior to his enlistment in the army, that alone is not sufficient to justify a verdict for the plaintiff in this case.

Evidence as to plaintiff's condition subsequent to his discharge from the army on July 30, 1919, may be considered by you only for the purpose of determining his condition while the contract upon which plaintiff bases his claim of right was in force that is prior to July 30, 1919.

In arriving at your verdict in this case, you are not at liberty to consider any testimony that may have been introduced on the trial concerning compensation said to have been paid by the United States to the plaintiff in his action. The right to compensation and the right to recover under a war risk insurance contract are based upon separate

and distinct causes, involve [282] separate and distinct rights and the right to one does not of necessity or at all give the right to the other.

The plaintiff in this case claims that he was totally and permanently disabled on the 30th day of July, 1919, it is admitted by the pleadings in this case that he made no application to the defendant or any of its boards or agencies for the payment of anything under the war risk insurance policy involved in this case until January 22, 1931. The rule is that in the absence of clear and satisfactory evidence explaining, excusing, or justifying it this long delay in making this claim is to be taken as strong evidence that he was not totally and permanently disabled before the policy on which this case is based, lapsed.

You are instructed that the plaintiff's conduct following the alleged accrual of his claim reflects his own opinion as to whether he was totally and permanently disabled at the time his insurance policy lapsed.

You are instructed that the mere fact that insured has not worked does not establish the fact that he was unable to work.

It is presumed that official duty has been regularly performed. A Doctor examining soldiers for induction into the United States Army is a public officer and acts as such and it is presumed that he properly and honestly performs his duty in examining the man and made a true and honest report of his findings. These presumptions have the weight

and effect of evidence and are binding upon you and you must find according to the presumption unless you are satisfied from other evidence that the presumption is not true.

You are instructed that evidence of the Insured's condition subsequent to the lapse of his policy may be considered only for the purpose of determining his condition while the contract was in force. [283]

You are instructed that in arriving at your verdict in this case you must not consider anything but the testimony presented during the trial of the case and the law as given to you by the Court.

Gentlemen: The statute upon which this action is based reads as follows: (that portion that is material) Section No. 300 of War Risk Insurance Act.

“In order to give every commissioned officer and enlisted man, and to every member of the Navy Nurse Corp, female, when employed in the active service under the War Department or Navy Department protection for themselves and their dependents, the United States upon application shall grant United States Government Life Insurance, converted insurance against the death or total permanent disability of any such person in any multiple of Five Hundred Dollars, and not less than One Thousand Dollars, or more than Ten Thousand Dollars upon the payment of the premiums as hereinafter provided, such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation.”

Mr. Justice Holmes of the United States Supreme

Court has rendered a decision recently, which may throw some light on the present case.

“The certificate of insurance provided in terms that it should be ‘subject in all respects to the provision of such Act (of 1917) of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the act, shall constitute the contract’. These words must be taken to embrace changes in the law no less [284] than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Section 1, and Article IV, Section 402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself, for the soldiers good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government’s hands to that extent no one else could explain. The only relations of contract were between the Government and him.”

You are instructed that if you find from the evidence that Carl F. Noble became totally and permanently disabled, as defined in these instructions, on or prior to the date to which his insurance was paid, it is immaterial whether the diseases, injuries, or disabilities, causing his total permanent disability were contracted prior to the date of his enlistment in the army, or during the time he was in the army, or whether it was contracted subsequent to his discharge from the army, if he became totally and permanently disabled, as those terms are in these instructions defined, at a time prior to July 30, 1919, his insurance then matured and became payable.

You are instructed that you are to consider the term "Total Disability," as any impairment of mind or body which renders it [285] impossible for the insured to follow a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it reasonably certain that it will continue throughout the lifetime of the insured.

You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of

itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled.

You are instructed that in determining whether the said Carl F. Noble is totally disabled, you may take into consideration his previous occupation, learning, and experience, in so far as it is shown from the evidence.

You are instructed that for the purposes of this action, the plaintiff must have been taken to be in sound physical condition when he enlisted in the defendant's army. [286]

You are instructed that if you should find from the evidence that Carl F. Noble became totally and permanently disabled as defined in these instructions from on or prior to July 30, 1919 the date of his discharge, and remained so totally and permanently disabled thereafter, that then his insurance did not lapse on October 1919, nor on any other date for nonpayment of premiums.

Testimony has been given by certain witnesses in this case, who in law are termed experts, and in this connection you are advised that while in cases, such as the one being tried, the law requires the evidence of men, experts in certain lines, as to their opinions derived from their knowledge of particular matters the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness. In other words the testimony of an expert like that of any other witness is to be received by you and given such weight as you think it is properly entitled to receive. The value of such testimony depends upon the circumstances of each case, and of these circumstances the jury must be the judge. When experts testify to matters of fact from personal knowledge, then their testimony as to such facts within their personal knowledge, should be considered the same as that of any other witness or witnesses who testified from personal knowledge. The plaintiff must prove his case by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrences sought to be proved. The facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jurors of the truth of the facts [287] alleged and sought to be proven, provided such circumstances, if any together with all

the evidence in the case, constitute a preponderance of the evidence.

You will not be influenced, gentlemen, by colloquy, or dispute between counsel during the trial, or between counsel and the court, or between the court and counsel, or witnesses, or remarks or statements not based upon the evidence.

You will base your verdict solely upon the evidence submitted to you, and wholly disregard remarks of counsel not based upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence, and any evidence erroneously admitted, and afterwards excluded, you will also disregard.

In this case, gentlemen, as in all others we have tried, you will accept the law as given you by the court, but you are the exclusive judges of the facts; the credibility of the witnesses and the weight to be given their testimony.

If there is a real or apparent conflict in the evidence, it is your duty to reconcile that conflict, so that all may stand, if it can be done. It is within your province to determine what you will accept as true, and what you will reject as false. In determining what weight you will give to the testimony of a witness you may consider all his evidence, whether it be reasonable or unreasonable, sustained or unsustained, whether it be corroborated by other credible evidence, and the knowledge that the witness has of the facts to which he testified; the intelligence of the witness; whether or not the witness

has been impeached; his opportunity of knowing or recollecting the facts about which he testified; his manner upon the witness stand; any bias or prejudice he may have exhibited toward or against plaintiff or defendant; his interest; if any, in the suit, and any and [288] all other facts and circumstances in evidence which in your minds go to increase or diminish the weight of such evidence.

Now, Gentlemen, it does not seem necessary for the court to go over the pleadings with you. The pleadings will be given you for consideration. When you retire to your jury room—there is really but one issue in the case, and the issue here is whether the plaintiff was on or before the date of his discharge July 30, 1919, totally and permanently disabled, and whether that condition of total and permanent disability is likely to continue throughout the lifetime of the plaintiff.

It takes twelve of your number to agree on a verdict. You should select one of your number to act as foreman, and he will sign your verdict when you agree. Are there any exceptions?

Mr. MOLUMBY: We have none.

Mr. BALDWIN: The Defendant objects and excepts to the refusal of the court to give its requested instruction number 1. The Defendant objects and excepts to the refusal of the court to give its requested instruction No. 9. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 10. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 14. The defendant ob-

jects and excepts to the refusal of the court to give its requested instruction No. 15. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 19. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 20. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 21. The defendant objects and excepts to the refusal of the court to give its requested instruction No. 22. The defendant objects and excepts to the [289] giving of that portion of instruction No. 1, requested by the plaintiff in the action, dealing with what Justice Holmes said in the case of *Emma White* against *United States of America* for the following reason. That the statement made by the learned Judge was made in argument and for the purpose of illustrating a point that he was making, and it is not the statement of a principle of law, that should be properly submitted to the jury. That the statement made by the learned Judge was made with special reference to an action brought on a converted policy of insurance, and has no application to an action brought upon a yearly renewable term policy, such as that involved in the case at Bar.

That the law is not as stated by the learned justice, that the position of the Government is one of benevolence, the fact being as a matter of law that the question for decision is based entirely upon contract, the right to which must be established by a preponderance of the evidence, and the money claimed must be shown by that degree of evidence

to have been earned within the terms of the policy. That the statement in that portion of the instruction that the relation was one of benevolence is apt to and probably will lead the jury to believe that they are not dealing with an ordinary suit or contract, but one which justifies the consideration of an added element—a benevolent duty on the part of the Government to compensate the soldier for what he may suffer, though it is not shown to be within the terms of the policy upon which this action is based. That the statement of the learned Justice that the matter is one of new experiment, and so on, is not within the issues; is not based on a fact appearing in the record here, and is merely the view of the learned Justice, in his opinion. [290]

Defendant objects to the giving by the court of plaintiff's requested instruction No. 2 for the reason that the statements contained in it, carry the issues on a matter to be determined by the jury, far beyond the issues as framed by the pleadings in this case, relate to extraneous matters and will justify a verdict against the defendant in the case so that the jury are not satisfied by a preponderance of the evidence that the case is within the terms of the policy, or that the plaintiff in the case was from the date of his discharge, July 30, 1919, permanently and totally disabled within the meaning of the law.

Defendant objects to the giving of instruction No. 4 requested by the plaintiff in this case for the reason that the same relates to and covers matters not based upon any evidence appearing in the case. To

illustrate the statement, "He may have worked when really unable and at the risk of endangering his health for life" is not based upon one word or syllable of testimony. There was not a word of testimony in the case properly before the court for consideration.

Defendant objects to the giving of instruction No. 5 requested by the plaintiff in this case for the reason that it contains an incorrect statement of the law, and it is not based upon the testimony in this case, there being no evidence in the record of this case, during the trial as to the learning of the plaintiff, Carl Noble, or of his experience, other than his experience in the occupation of a farmer.

Defendant objects to the giving of the instruction with reference to total and permanent disability on the ground and for the reasons following:

That it does not contain a correct statement of the principle of law; that it is involved, and may because of that involvement [291] mislead the jury; that it tends rather to confuse the mind rather than to enlighten the mind of the jury in arriving at their verdict, and that it wholly fails to include within its terms one of the essential elements laid down in *Lumbra* against the United States, in this that it wholly omits a definition as given by that court as follows: "But manifestly work performed may be such as conclusively to negative total and permanent disability at the earliest time"—in this case the date of the discharge of the plaintiff from the army July 30, 1919.

Defendant's instructions Nos. 1, 7, 9, 10, 14, 15,

19, 20, 21, 22, which were refused by the Court are in words and figures as follows, to-wit:

Defendant's Requested Instruction No. 1.

You are instructed to find your verdict for the defendant in this case.

Defendant's Requested Instruction No. 7.

You are instructed that vocational training was given to veterans disabled in the service during the World War only after a determination that such veteran was unable to follow the occupation or occupations which he had followed prior to the World War.

Defendant's Instruction No. 9.

The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence that he was totally and permanently disabled while the policy was in force,—that is on or after September 20th, 1917, and prior to July 30th, 1919, and could not thereafter continuously follow any gainful occupation; it is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally [292] and permanently disabled on or between September 20th, 1917, and July 30, 1919, your verdict must be for the defendant for at least two elements, total disability and permanent disability, must concur before plaintiff has a right to recover in the action.

In determining whether plaintiff was totally and

permanently disabled prior to July 30, 1919, the test is whether he, at that time, had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be for the defendant.

Defendant's Instruction No. 14.

The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant.

Defendant's Instruction No. 15.

Whenever a party has by his own declaration, act or omission intentionally and deliberately led an-

other to believe a particular [293] thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for his discharge from the United States Army he was asked the following questions and gave the following answers in writing, to-wit:

Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in military service?

A. Yes.

Q. If so describe the disability stating the nature and kind of wound, injury or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple of months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred?

A. Unknown.

and by such declarations and acts, intentionally and deliberately led the defendant and its officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in military service, except as stated there-

in, and thus secured his discharge from said Army, he cannot now be permitted [294] to falsify said statement. (Sub-division 3, Section 10, 605, R. C. M.; 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 19.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict and therefore, if a weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence should be reviewed with distrust. (Sub-divisions 6 and 7, Section 10, 672, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 20.

A wife cannot be examined against her husband without his consent; nor can a wife, during the marriage or afterwards, be, without the consent of her husband, examined as to any communication made by him to her during the marriage. (Sub-division 1, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 21.

A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. (Sub-division 4, Section 10, 536, R. C. M. 1921; Section 631, Title 28, U. S. C.)

Defendant's Requested Instruction No. 22.

You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. [295]

(Section 10, 605, R. C. M. 1921; Section 631, Title 28, U. S. C.)

[Title of Court and Cause.]

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 30th day of July, 1919, the date of his discharge.

C. H. PACKARD,
Foreman.

Filed Nov. 1, 1934.

That on November 1, 1934 the attorneys for the plaintiff and defendant signed their stipulation, which, after the title of court and cause, is in words and figures as follows:

“IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, acting through their respective counsel of record, that the defendant may have and is hereby granted ninety days from this date in which to prepare, serve and file a bill of exceptions herein;

IT IS FURTHER STIPULATED AND AGREED that an order may be made by the Judge of the above entitled court giving and granting to the defendant ninety days from this date in which to prepare, serve and file a bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934.”; [296]

And thereafter, and on November 1, 1934 said Stipulation so signed as aforesaid, was filed in the above entitled court and cause, and subsequently on that day the Honorable Charles N. Pray, the Judge who tried said action, signed and filed an Order, which, after the title of court and cause, is in words and figures as follows:

“Pursuant to the stipulation of the parties hereto, it is ordered and this does order that the defendant above named may have and is hereby granted ninety days from and after the 1st day of November, 1934 in which to prepare, serve and file its bill of exceptions in the above entitled cause.

Dated this 1st day of November, 1934.

CHARLES N. PRAY,
Judge.”

That on November 17, 1934 the Honorable Charles N. Pray, the Judge who tried said cause, signed and filed therein an order which, after the title of court and cause, is as follows:

“IT IS HEREBY ORDERED, and this does order, that the term at which the trial of the

above entitled action was had be, and it is, hereby extended to and including the day on which defendant's bill of exceptions is finally settled.

Dated this 17th day of November, 1934.

CHARLES N. PRAY,

Judge."

AND NOW within the time allowed by law and the extension of time granted by the court, the defendant prepares and files herein its proposed Bill of Exceptions, embodying an order of the Judge granting the defendant ninety days within which to prepare, serve and file its Bill of Exceptions herein, stipulation of counsel relating thereto and an order of the Judge extending the term at which the above entitled cause was tried to and including the day upon which defendant's Bill of Exceptions is finally [297] settled; embodying all of the rulings of the court and proceedings had on the trial of said cause, the exhibits offered and received, and prays that the same be allowed, signed and settled and filed as defendant's Bill of Exceptions.

JAMES H. BALDWIN,

United States Attorney for the
District of Montana.

R. LEWIS BROWN,

Assistant United States
Attorney.

FRANCIS J. MCGAN,

Attorney,

Department of Justice.

(Attorneys for Defendant)

Service of the foregoing Bill of Exceptions and receipt of a copy thereof is hereby acknowledged this 23 day of January, A. D. 1935.

MOLUMBY, BUSHA & GREENAN,

By C. T. Busha, Jr.,

(Attorneys for Plaintiff)

And thereafter, and on the 2nd day of February, 1935, and within the time allowed, the plaintiff duly and regularly proposed his amendments to the said Proposed Bill of Exceptions of the Defendant, which said amendments are, after omitting the title of the Court and cause, in words and figures as follows, to-wit:

COMES NOW, the Plaintiff in the above entitled action and respectfully proposes the following amendment to the proposed bill of exceptions lodged with the court.

That that portion of the Bill of Exceptions from line 8 on page 182, to and including line 19 on page 192, be stricken.

Also throughout the entire transcript there are many misspelled words and typographical errors too numerous to except to and which should be corrected by stipulation in order to have the transcript understandable to the higher court.

MOLUMBY, BUSHA & GREENAN,

Attorneys for Plaintiff. [298]

And thereafter, and on the 4th day of February, 1935, the above entitled Court by its order duly given and made set Tuesday, the 12th day of February, 1935, at ten o'clock A. M., as the day set for the settlement of said Proposed Bill of Exceptions;

And thereafter, and on the 12th day of February, 1935, at ten o'clock A. M., at the Court House of said Court at Great Falls, Montana, the Court proceeded with the settlement of said Bill of Exceptions, Molumby, Busha & Greenan being present as counsel for the plaintiff and R. Lewis Brown, Assistant United States Attorney, being present as counsel for the defendant, and

Thereupon the said proposed amendments to said defendant's Proposed Bill of Exceptions was denied by the Court, to which said ruling of the Court the plaintiff then and there asked for and was by the Court granted an exception, and

Thereupon the Court signed, settled and allowed the said Bill of Exceptions.

CERTIFICATE.

The undersigned Judge, who tried the above entitled action, hereby certifies that the above and foregoing is a full, true and correct bill of exceptions in said action and contains all of the evidence introduced, proceedings had, and the exceptions taken in the trial of said action; and,

IT IS ORDERED, and this does order that the above and foregoing be approved, allowed and

settled as a true and correct bill of exceptions herein. Within the judgment term or as extended.

Dated this 12th day of February, 1935.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 12, 1935. [299]

Thereafter, on January 23, 1935, Assignment of Errors and Prayer for Reversal was duly filed herein, in the words and figures following, to-wit: [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS
AND
PRAYER FOR REVERSAL.

Comes now the United States of America, the defendant in the above-entitled action, by its attorneys, and in connection with its petition for appeal, says that in the record and proceedings had in the above-entitled action manifest error has intervened to the prejudice of the defendant, upon which it will rely in the prosecution of its appeal herein, to-wit:

I.

The Court erred in overruling defendant's objection to the introduction of any testimony in the case, to which action of the Court defendant then and there duly excepted as follows:

“Mr. BALDWIN: At this time the Defendant objects to the introduction of any testimony in this

case upon the grounds and for the reasons following, that the court is without jurisdiction of the person of the defendant.

(2) That the court is without jurisdiction of the subject of the action.

(3) That the defendant cannot without its consent be sued, and it has not consented to be sued in this action.

(4) That the complaint fails to state a cause of action.

(5) That it is not shown by the complaint in this case that the plaintiff has brought himself within the provisions of the statute authorizing the bringing of an action against the defendant in this case. That it appears from the complaint in [35] the case that there has been no denial of any claim made by the plaintiff by the Administrator of the Veterans Administration, and finally that it does not appear on the face of the pleadings in this case that the action was brought within the time within which an action of this kind might be brought.

The COURT: I will overrule the objection.

Mr. BALDWIN: I will ask an exception." (p. 2, line 12 to line 1, p. 3.)

II.

The Court erred in overruling defendant's objection to the following question asked of the witness Matson by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted as follows:

“Q. Do you see any difference in his appearance from the time you first saw him up until the present time?

A. I think I do.

Q. What is that difference?

Mr. BALDWIN: Object to this as immaterial and too remote; fifteen years after the occurrence.

The COURT: Overrule the objection.

Mr. BALDWIN: Note an exception.

A. Well, he is much weaker now than he was. He is bedfast.

Q. What, if any, difference have you noticed with reference to his nervous condition over those years?

A. Well, it is quite similar now as to what it was then.” (p. 87, line 24 to p. 88, line 5.)

III.

The Court erred in overruling defendant’s objection to the introduction of plaintiff’s exhibit No. 1, offered by counsel for the plaintiff, to which ruling of the court defendant then and there duly excepted, as follows:

“Q. I will show you what is marked Plaintiff’s Exhibit 1 [36] for the purposes of identification, and ask you if that is the affidavit that counsel on cross examination has been questioning you. Is that the affidavit he has been questioning you about?

A. I would judge so.

Q. Is that the one that he handed to you and asked you to examine?

Mr. BALDWIN: We will admit that it is.

Mr. MOLUMBY: We offer Plaintiff's Exhibit No. 1 in evidence.

Mr. BALDWIN: We object to certain portions of it, as it is clearly evident from the testimony here that they are hearsay.

Mr. MOLUMBY: I think we are entitled to have the whole portion go in.

Mr. BALDWIN: That is the condition of Carl Noble in 1919, which was two years before this witness ever saw him. He didn't meet him until 1921.

The COURT: I don't see how you now can object to any portion of it going in. You have examined so thoroughly in regard to that affidavit, unless you can show where it can be separated.

Mr. BALDWIN: Probably I can clear the matter. That is the only objection, because he swears he knew the condition of the man two years before he ever saw him.

Mr. MOLUMBY: There is the difficulty of examining a witness concerning something that is not in evidence. Then later he does not like the rest of it. I think where a portion has gone into the examination, the whole thing is entitled to go in.

The COURT: I think I will let it go in without any reservation at all.

Mr. BALDWIN: We will ask an exception.

Whereupon, Plaintiff's Exhibit No. 1 was received in evidence and is in words and figures as follows, to-wit:

“PLAINTIFF’S EXHIBIT NO. 1. [37]

State of Montana,
County of Fergus.—ss.

I, Charles Matson, living in Grass Range, Montana, after being duly sworn, do make the following statements:

That I have known Carl Noble for many years. I know that he has had heart trouble ever since he was discharged from the army in 1919.

The reason that I know that his heart was in bad shape is that I have been troubled with sickness a great deal myself the last few years, and as usual when two sick persons get together they compare notes.

Mr. Carl Noble was a frequent customer at my barber shop and I had a good chance to exchange views with him regarding our health. I know that he quit using tobacco and advised me to do the same. I also know that he was getting some medicine from the drug store for his heart.

I remember very well that he had a bad spell with his heart in June and July, 1921 and that he was unable to do manual labor after the fall of 1921, although he did drive a team a short while after this time.

He was in my barber shop the day he left for Great Falls, Montana, to have his appendix removed. As I shaved him that day I asked him if he was not afraid to undergo an operation on account of the condition of his heart. He told me he was, but that he would have to risk it anyway.

I know that he went to the hospital in the spring of 1923 and was there for six or seven weeks. He left for the hospital in St. Paul, Minn., in February, 1924 and he is still there.

The reason that I make the above statements are that I am informed that service connection of his disability has been taken away from him because of insufficient evidence as to his heart condition prior to the appendicitis operation, and I know that he was troubled with his heart from soon after he was discharged [38] from the army in 1919 until he left for St. Paul, Minn. and because of myself being on the sick list we often talked about his condition and my own.

I have no personal interest in his claim and am in no way related to him.

Charles E. Matson

Subscribed and sworn to before me this 12th day of January, 1925.

Geo. Breckenridge

Notary Public, for the State of Montana,
Residing at Grass Range.

My commission expires May 1st, 1925.

True copy seen by me this 17th day of Feb., 1925.

Antoinette Zicher

Notary Public, Minn.

Commission expires April 11, 1930.

Filed March 9, 1925." (p. 92, line 18 to p. 95, line 4.)

IV.

The Court erred in sustaining plaintiff's objection to the following question asked of the witness, Mrs. Noble, by counsel for the defendant and not permitting said witness to reply thereto, to which ruling of the Court defendant then and there duly excepted:

"Q. Can you tell me how much money Mr. Noble deposited in the bank in any year since your marriage?"

Mr. MOLUMBY: We object to that as not proper cross examination.

The COURT: I think so. Sustain the objection.

Mr. BALDWIN: Note an exception." (p. 122, lines 24-28).

V.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. And will you state to the jury just what your findings were, upon your examination of him?"

A. I was asked to see Mr. Noble to see if his condition was such that he might come into court.

Mr. BALDWIN: I object to that as immaterial.

[39]

The COURT: Yes.

Q. Just state what your findings were.

A. I found a very sick man; a man who was too weak to stand unassisted; anemic, nervous; stuttered in trying to answer questions; complained of a

multitude of symptoms including vomiting, palpitation, weakness, loss of appetite or no appetite. I don't know of any more complaints. I found upon my physical examination of him an anemic man that was unable to stand unassisted; who has gross tremor of the hands or other muscles; the legs are very atrophied from disuse. He has a distinct stutter or imperfect speech when asked a question, and from his history I found it difficult to get any intelligent history. He has thought his symptoms so long——

Mr. BALDWIN: We object to what he thought about it, as a conclusion.

The COURT: Yes that is a conclusion. Strike it out.

A. In answering questions as to what he complained of, he stated things which were not explained, making it difficult to state what his complaints really are. As to whether I examined his pulse and heart, I did not examine him that evening, but at a later date I examined him, complete physical examination.

Mr. BALDWIN: That examination was for the purpose of testifying, was it not?

A. The later examination was for the purpose of testifying.

Mr. BALDWIN: I object to that as incompetent, irrelevant and immaterial.

The COURT: What part of it, all of it?

Mr. BALDWIN: No, the part that is for the purpose of testifying. He has not given him treat-

ment with any idea of prescribing merely for coming into court and testifying.

WITNESS: I have the patient under treatment at the present time.

Mr. BALDWIN: We also add the ground that it is too remote. [40]

The COURT: I will overrule the objection.

Mr. BALDWIN: We will note an exception. May we have a general objection and exception along this line to each question.

The COURT: Yes.

Q. Do you recall the question?

A. Yes. I examined his pulse and his blood pressure, heart rate sounds. He carries a constant high pulse rate. 99 to 100 or better. His blood pressure is from 182 to 202. His heart sounds are similar in character; shows a weak myocarditis. That means heart muscles. I should have said his reflexes are exaggerated. I mean the reflexes, such as the jaw, the muscles of the arm, the abdomen. That is the tentative reflexes which are indicative of his present nervous disturbances. Laboratory tests show the degree of his anemia. I did not make the laboratory test, I had them made. As to what else I observed in his physical examination, upon my examination, the outstanding thing besides his physical condition is the apparent mental disturbance. It is such that I classify him as a definite neurotic, which is not mild at all. As to what was apparent to me from my examination of his heart condition that I have described, it was apparent that he had no reserve, that his heart is being taxed to

the utmost constantly, so much so that an exertion would endanger his life. As to how severe an exertion, I will say that I would not feel that he would be able, as an example, to be walking about without endangering himself. As to whether there is anything else in his condition that I have not as yet described, that I discovered, he showed evidence of past care; he had a scar in his abdomen of an operation for appendicitis; and he has another scar below the right rib margin which is operative in character, and from which I am told a tumor was removed." (p. 130, line 24 to p. 132, line 30).

VI.

The Court erred in overruling the defendant's objection to the following question asked of the witness, Dr. Alred, by [41] counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. Will you state what your diagnosis of the plaintiff's condition is?

Mr. BALDWIN: We object to that as immaterial, what his present diagnosis shows; too remote.

The COURT: He may answer.

Mr. BALDWIN: Note an exception.

A. His diagnoses are multiple; they are as follows: anemia, nephritis, chronic; myocarditis; hypertension; arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate. I will state what I mean by anemia, it means less than a normal amount of red blood content. By

nephritis, it means an impairment of the kidneys. Myocarditis means a weak heart, attack of the heart muscles. Hypertension means an increase over a normal amount of blood pressure. Arterial sclerosis means the hardening of the arteries on some or all parts of the body. Atrophy of the legs means that both in size and ability have shrunk, or disappeared." (p. 133, lines 7-23.)

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. Doctor, defining the term total disability as follows: Total disability being any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health and that total disability is to be considered as permanent when it is of such a nature as to render it reasonably certain that it will continue throughout the lifetime of the plaintiff, and that total disability does not mean helplessness or complete disability, but includes more than that which is [42] partial; permanent disability means that which is continuing as opposed to that which is temporary; that distinct periods of temporary disability do not constitute that which is permanent. That the mere fact that

one has done some work is not of itself sufficient to defeat one's claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If one is able to follow a gainful occupation only spasmodically, with frequent interruptions due to his disability, or if the periods of work, though more or less regular and continuous were done at the risk of endangering his health or life, he was nevertheless totally and permanently disabled, but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled. And taking into consideration, Doctor, the examination you made of the plaintiff, and considering these facts to be true that Carl Noble enlisted in the United States Army on the 20th day of September, 1917, and served in the United States Army down to and including the 30th day of June, 1919, in the 60th Infantry of the 5th Division, first going to Spokane, Washington, then to Camp Gettysburg, Pa., thence to Camp Green, Charlotte, North Carolina, and while at Camp Green had the mumps, reported to the Infirmary and the doctor ordered him back to duty, and that that same afternoon again reported to the Infirmary and was examined by two doctors who decided there was nothing wrong with him; that he then reported to the Infirmary again the next morning and he was given castor oil and marked 'duty', and went back to camp and took a detail out to clean out ditches, and the

next morning the mumps went down on him, and he then again reported to the Infirmary, and the doctor told him he had had the mumps but was over them; that he had a swelling in the groin and testicles and was moved to Camp Merritt while in that condition, and was there in bed for a couple of days while in quarantine, and remained in quarantine for about a week with no duties to perform, and at the end of the quarantine went to Hoboken and [43] boarded ship for France on the 16th of April, 1919. Upon arriving in France was sent up to the front with his division in the Alsace-Lorraine Sector and was 15 days under shell fire in that sector, he being a waggoner whose duty it was to go up with the supply train from the railheads to the front line, and thereafter was 39 days under shell fire in an area south of St. Mihiel, and later was under shell fire for 10 days in the St. Mihiel, and still later 39 days under shell fire in the Meuse Argonne, and that he was gassed in the St. Mihiel offensive, vomitted and was sick to his stomach, had diarrhea, felt sick and sore in the chest for a week or ten days; then later while in the Argonne was again gassed and vomitted frequently for several days and had diarrhea which remained with him until after the Armistice was signed, and on neither of these two occasions reported to the hospital or Infirmary for treatment; that while in the Argonne near Mont Foucan a shell exploded under the wagon he was driving, tearing off a portion of the wagon, the end gate and brake, the team hitched to the

wagon running away and piling up at the foot of the mountain with the plaintiff tangled up in the pile-up; that five days later had aged greatly and from then on was extremely nervous, excitable and would stutter when he talked, would wave his arms and looked wild, had starey eyes, would scream and yell at the horses and men, and even at the officers, and that this condition remained with him all during the rest of his service in the army and existed at the time of his discharge from the army and has remained at all times since then to the present date; that after this experience the plaintiff did not report to the hospital or Infirmary for treatment; that after the Armistice was signed he proceeded with his regiment to Luxemburg, and while in Luxemburg had the influenza and was laid up in his billet in bed for four or five days, and when he got up was sick and was a long time getting his strength back, and thereafter and until his discharge had very little to do as far as duty was concerned until he came back to this country with [44] his regiment and was discharged; that after his attack of flu in Luxemburg he was short of breath and got fatigued quickly and at the time of his discharge from the army was nervous, soft, couldn't stand much exertion and when he exerted himself was short of breath and the veins in his neck would throb, his ears would throb and he would have palpitation, and that on the 31st day of December, 1918, the plaintiff was cited for devotion to duty during the St. Mihiel and Argonne offensives.

Mr. BALDWIN: We object to that part as immaterial.

The COURT: Yes, it is immaterial.

Mr. MOLUMBY: Disregard that statement with reference to the citation to devotion to duty.

That after being discharged from the army he returned to his home in Grass Range, Montana and lived with his brother on the ranch occupied by him prior to his entry into the army, doing no work that Fall or Summer except that he did some plowing and when plowing would find himself rigid and stiff on the plow, would then relax and before he had gone 30 rods would be in the same condition—just as tight as a fiddle string; that his work would be interrupted because of sleepless nights; he would get to palpitating and the bed would seem to shake and when he didn't work he wasn't troubled much, but when he worked would be restless, his heart would pound and he could feel the bed shake, he would have night-mares and troubled dreams. Most of them were connected with the men hollering; these fellows in his dreams had liquid fire on them and were hollering and he would want to put the fire out and imagined that he had it on himself sometimes even though he had never personally encountered liquid fire while in the army, or at all. If he worked after a night of that kind, it would be worse the next night; that that winter of 1919 and 1920 he did not do any work and in the spring of 1920 his brother put in the crop on his ranch and it was necessary for them to hire a fellow a few days at a

time because the plaintiff was unable to go ahead with the work, [45] but did some of the easiest jobs; that the plaintiff drove the team some and could stand it a while and then would have to quit; that that summer and fall the crop was harvested by his brother and hired help; that in the spring of 1921, the plaintiff worked upon the seeding of 30 acres for about a day and had to quit because he was sick, and his brother and one Bert Ingram put in the crop on the place in 1921; that that summer the crop was harvested and threshed by his brother and Bert Ingram; that in the summer of 1921 the summer fallowing of about 50 acres was done by his brother and one Bert Ingram and in the spring of 1922 his brother and a hired man put in 40 or 50 acres of summer fallow and 30 acres of spring wheat, the plaintiff doing a little of the work in seeding for a day or two at a time; that since that time the plaintiff has attempted to do no work whatever and has been unable to do any work whatever; that in the fall of 1919, in November, he procured a mixture of digitalis from the druggist in Grass Range and at which time he had a jumpy throbbing pulse and palpitation, a temperature of 99.6, shortness of breath, an eye stare, was nervous, fidgety, haggard and stuttered. Thereafter, and over a period of 18 months off and on he procured a similar medicine from the druggist; that in February, 1923, he was examined by Dr. Porter of Lewistown and found to be suffering from heart trouble and extreme nervousness, and was advised to go to the

Government hospital; that when he first returned from the army he was weak and pale, had aged greatly while in the army; had become grey haired, was short of breath, was highly nervous, excitable, stuttered, would get incoherent when talking and used his hands and his hands fluttered when talking; that this condition has existed ever since his discharge from the army, this condition of nervousness that I have just described has existed ever since his discharge, to the present date; that he has gradually grown a little worse; that he was in the Deaconess Hospital and operated on for appendicitis in June or July of 1922 and was in the Veterans' Bureau Hospital at Fort Harrison in 1923 for about six weeks in the early spring, and in the following February went to the U. S. Veterans' Bureau Hospital in St. Paul known as [46] the Aberdeen Hospital, and was in bed for a period of 13 or 14 months, and then returned to his ranch at Grass Range and was again hospitalized in 1931 in Helena for 6 or 7 weeks and again in the spring of 1932 was in the hospital at Fort Harrison, Helena, Montana for three weeks, and again in the spring of 1933, was hospitalized at Lewistown, for a couple of weeks, and transferred from the hospital at Lewistown to the hospital at Fort Harrison where he remained for a period of nine months, at which time he was brought home on a stretcher, and has remained in bed ever since, and up to the present date. Assuming these facts to be true, Doctor, and

taking into consideration what you observed of the plaintiff on your examination of him, and defining total disability as I have heretofore in this question defined it, state whether or not the plaintiff, Carl Noble, was or was not in your opinion totally and permanently disabled on the date of his discharge from the army, July 30, 1919?

Mr. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law means this, and this only: any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by counsel into the question is used in the argument by the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the conclusion of the expert, if stated to him, which do appear from the records in this case. [47]

The COURT: Overrule the objection.

Mr. BALDWIN: I will ask an exception.

A. During those six days and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He was undoubtedly totally and permanently disabled if those be true facts in following your definition.

Q. And at what time?

A. At the time of discharge? (p. 133, line 24 to p. 140, line 4.)

VIII.

The Court erred in overruling defendant's motions made at the close of the plaintiff's evidence that the case be dismissed and that a verdict be directed in favor of the defendant, to which action of the Court defendant then and there duly assented as follows:

MR. BALLEWINE. Defendant now moves that the case be dismissed on the following grounds:

That the Government cannot, without its consent, be sued and it has not consented to be sued in this action; that the court has no jurisdiction of the person of the defendant; that the court has no jurisdiction of the subject of the action; that the complaint fails to state facts sufficient to constitute a cause of action; that it appears definitely from the complaint that no denial of any claim made by the plaintiff has ever been appealed to or decided by the Administrator of the Veterans' Administration; that it appears definitely from the proof of the plaintiff, made by the deposition of Carl F. Noble, the plaintiff here, if it be credited, that the only decision upon which he bases his claim of right to

sue is based upon an apparent judgment by the Insurance Claims Council: that as a result of his advice, failed to carry his claim to a conclusion, and to avail himself of all remedies within the Veterans' Administration. He has failed to place himself in a position where he has a right to sue the Government or maintain an action in this [48] court.

On the further ground that it appears definitely from the proof put in by plaintiff that there is a material variance between the claim on which he bases his right to sue here and to recovery, if recovery is allowed, and the claim as stated in this complaint in this action.

Defendant now moves that the court direct a verdict for the defendant in this case on the grounds stated in its motion that the action be dismissed, and on the added ground that by its complaint, or by his complaint, the plaintiff has limited himself to a specified day, July 30, 1919, the date of his discharge from the army, and his claim for disability, as proven by him, relates to a later date.

The COURT: Overruled.

Mr. BALDWIN: We will ask an exception." (p. 169, line 16 to p. 170, line 18.)

IX.

The Court erred in permitting plaintiff to amend his complaint herein after the close of the plaintiff's evidence, to which action of the Court defendant then and there duly excepted:

The COURT: Is there any variance in the proof, and your allegation?

MR. MOLUMBY: In this respect only: the allegation of the complaint is that the Director of the Veterans Bureau and the Bureau of War Risk Insurance, by recent Act of Congress, has changed their name and call it the Veterans Administration.

THE COURT: Isn't that the way it was when the complaint was filed?

MR. BALDWIN: Yes.

MR. MOLUMBY: I think they changed the name prior to the filing of this complaint. I would ask leave to amend the allegation of the complaint to add, on page 3, line 1, after the words 'Bureau of War Risk Insurance' the following words, [49] 'And the Veterans Administration.' In line 6 before the words, or the word 'Insurance' by adding the words 'And Veterans Administration,' and after the word 'Directors' add the words 'And Administrators'. I would ask leave to amend that.

THE COURT: I will allow the amendment. Call in the Jury.

MR. BALDWIN: Note an exception." (p. 170, line 19 to p. 171, line 6.)

X.

The Court erred in overruling the motion made by the defendant at the close of all the evidence that the action be dismissed, to which ruling of the Court defendant then and there duly excepted as follows:

"MR. BALDWIN: Defendant now moves that this action be dismissed on the grounds stated in its motion at the close of plaintiff's case. I take it the

record may show by agreement of counsel and with the consent of the Court, that the grounds are inserted here, and not reported.

Mr. MOLUMBY: It is so stipulated.

* * * * *

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve, and file our Bill of Exceptions." (p. 195, lines 25-30; p. 196, lines 15-21.)

XI.

The Court erred in overruling the motion made by the defendant at the close of all the evidence for a directed verdict in its favor, to which action of the Court defendant then and there duly excepted as follows:

“Mr. BALDWIN: The defendant now moves that the court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the [50] plaintiff’s case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

Mr. MOLUMBY: Yes, it is so stipulated.

Mr. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground

that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on an added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

The COURT: The motion will be denied.

Mr. BALDWIN: I ask an exception at this time to each of the rulings of the Court. The ruling denying the motion to dismiss, and the ruling denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve and file our Bill of Exceptions.' (p. 196, lines 1-21.)

XII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

"Defendant's requested instruction No. 1.

You are instructed to find your verdict for the defendant in this case." (p. 210, lines 13-15.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"Mr. BALDWIN: The defendant objects and excepts to the refusal of the court to give its requested instruction No. 1." (p. 207, lines 15-16.)

XIII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 9, as follows:

“Defendant’s instruction No. 9.

The burden is on the plaintiff in this case to show with reasonable certainty by a clear preponderance of the evidence [51] that he was totally and permanently disabled while the policy was in force,—that is, on or after September 20th, 1917, and prior to July 30th, 1919, and could not thereafter continuously follow any gainful occupation. It is not enough for him to show that he was temporarily totally disabled at times or that he was permanently partially disabled. If it does not appear by a preponderance of the evidence in this case that the plaintiff became totally and permanently disabled on or between September 20th, 1917 and July 30, 1919, your verdict must be for the defendant for at least two elements, total disability and permanent disability must concur before plaintiff has a right to recover in the action.” (p. 210, line 21 to p. 211, line 4.)

To which action of the Court defendant then and there duly objected and excepted as follows:

“The defendant objects and excepts to the refusal of the court to give its requested instruction No. 9.” (p. 207, lines 16-18.)

XIV.

The Court erred in refusing to give to the jury defendant’s requested instruction No. 10, as follows:

“Defendant’s requested instruction No. 10.

In determining whether plaintiff was totally and permanently disabled prior to July 30, 1919, the test is whether he, at that time, had a disability which rendered it impossible for him to follow continu-

ously any substantially gainful occupation, founded upon conditions which then indicated with reasonable certainty that such impairment would continue throughout his life and unless plaintiff has proven by a preponderance of the evidence that prior to July 30, 1919, he had a disability which rendered it impossible for him to follow continuously any substantially gainful occupation and that the conditions were then such as to indicate with reasonable certainty that it would be impossible for him to follow continuously any substantially gainful occupation throughout his life, your verdict must be [52] for the defendant." (p. 211, lines 5-17.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 10." (p. 207, lines 18-20.)

XV.

The Court erred in refusing to give to the jury defendant's requested instruction No. 14 as follows:

"Defendant's instruction No. 14.

The vital date in this case is July 30, 1919, and unless you are satisfied by a preponderance of the evidence in this case that on that date the plaintiff Carl F. Noble was wholly unable to follow any substantially gainful occupation and that his condition was then such and of such a nature and founded on such conditions that it was reasonable to suppose and believe that he would be wholly unable to follow

any substantially gainful occupation throughout the remainder of his lifetime, your verdict in this case must be for the defendant." (p. 211, lines 18-27.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 14." (p. 207, lines 20-21.)

XVI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 15 as follows:

"Defendant's instruction No. 15.

Whenever a party has by his own declaration, act or omission intentionally and deliberately lead another to believe a particular thing to be true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify; and as it appears from the testimony of the plaintiff in this case himself and entirely without contradiction that at the time he applied for [53] his discharge from the United States Army he was asked the following questions and gave the following answers in writing, to-wit:

"Q. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in military service?

A. Yes.

Q. If so describe the disability stating the nature and kind of wound, injury or disease.

A. Hearing.

Q. When was the disability incurred?

A. Couple a months ago.

Q. Where was the disability incurred?

A. France.

Q. State the circumstances, if known, under which the disability was incurred?

A. Unknown.

and by such declarations and acts, intentionally and deliberately led the defendant and its officers and agents to believe that he did not then have any reason to believe that he was then suffering from the effects of any wound, injury or disease or have any disability or impairment of health whether or not incurred in military service, except as stated therein, and thus secured his discharge from said Army, he cannot now be permitted to falsify said statement. (sub-division 3, Section 10, 605, R. C. M.; 1921; Section 631, Title 28, U. S. C.)" (p. 211, lines 28 to p. 213, line 2.)

To which action of the Court defendant then and there duly objected and excepted as follows:

"The defendant objects and excepts to the refusal of the court to give its requested instruction No. 15." (p. 207, lines 22-23.)

XVII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 19 as follows:

“Defendant’s requested instruction No. 19.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict and therefore, if a weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence should be reviewed with distrust. (Sub-divisions 6 and 7, Section 10, 672, R. C. M. 1921; Section 621, Title 28, U. S. C.)” (p. 213, lines 3-11.)

To which ruling of the Court defendant then and there duly objected and excepted as follows:

“The defendant objects and excepts to the refusal of the court to give its requested instruction No. 19.” (p. 207, lines 23-25.)

XVIII.

The Court erred in refusing to give to the jury defendant’s requested instruction No. 22 as follows:

“Defendant’s requested instruction No. 22.

You are instructed that the plaintiff in this action is now estopped from claiming that at the time of his discharge from the United States Army he was suffering from the effects of any wound, injury or disease or that he had any disability or impairment of health, whether or not incurred in the military service. (Section 10, 605, R. C. M. 1921; Section 631, Title 28, U. S. C.)” (p. 213, line 24 to p. 214, line 1.)

To which ruling of the Court defendant then and there duly objected and excepted as follows:

“The defendant objects and excepts to the refusal of the court to give its requested instruction No. 22.” (p. 207, lines 28-30.)

XIX.

The Court erred in charging and instructing the jury as follows:

“Mr. Justice Holmes of the United States Supreme Court has rendered a decision recently, which may throw some light [55] on the present case.

“The certificate of insurance provided in terms that it should be “subject in all respects to the provisions of such Act (of 1917) of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.” These words must be taken to embrace in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, Section 1, and Article IV, Section 402 of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not paternal, was at least avuncular.

It was a relation of benevolence established by the Government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent, no one else could complain. The only relations of contract were between the Government and him.''' (p. 202, line 21 to p. 203, line 17.)

Defendant's objection to said instruction being as follows:

“The defendant objects and excepts to the giving of that portion of instruction No. 1, requested by the plaintiff in the action, dealing with what Justice Holmes said in the case of *Emma White* against *United States of America* for the following reasons: That the statement made by the learned Judge was made in argument and for the purpose of illustrating [56] a point that he was making, and it is not the statement of a principle of law, that should be properly submitted to the Jury. That the statement made by the learned Judge was made with special reference to an action brought on a converted policy of insurance, and has no application to an action brought upon a yearly renewable term policy, such as that involved in the case at bar.

That the law is not as stated by the learned Justice, that the position of the Government is one of benevolence, the fact being as a matter of law that the question for decision is based entirely upon con-

tract, the right to which must be established by a preponderance of the evidence, and the money claimed must be shown by that degree of evidence to have been earned within the terms of the policy. That the statement in that portion of the instruction that the relation is one of benevolence is apt to and probably will lead the jury to believe that they are not dealing with an ordinary suit or contract, but one which justified the consideration of an added element,—a benevolent duty on the part of the Government to compensate the soldier for what he may suffer, though it is not shown to be within the terms of the policy upon which this action is based. That the statement of the learned Justice that the matter is one of new experiment, and so on, is not within the issues; is not based on a fact appearing in the record here, and is merely the view of the learned Justice, in his opinion.” (p. 207, line 30 to p. 208, line 30.)

XX.

The Court erred in charging and instructing the jury as follows:

“Plaintiff’s requested instruction No. 2.

You are instructed that if you find from the evidence that Carl F. Noble became totally and permanently disabled as defined in these instructions, on or prior to the date to which his insurance was paid, it is immaterial whether the diseases, injuries, or disabilities, causing his total permanent disability were contracted prior to the date of his enlistment

in the army, [57] or during the time he was in the army, or whether it was contracted subsequent to his discharge from the army, if he became totally and permanently disabled, as those terms are in these instructions defined, at a time prior to July 30, 1919, his insurance then matured and became payable.” (p. 203, lines 18-28.)

Defendant’s objection to said instruction being as follows:

“Defendant objects to the giving by the court of plaintiff’s requested instruction No. 2 for the reason that the statements contained in it carry the issues on a matter to be determined by the jury, far beyond the issues as framed by the pleadings in this case, relate to extraneous matters and will justify a verdict against the defendant in the case so that the jury are not satisfied by a preponderance of the evidence that the case is within the terms of the policy, or that the plaintiff in the case was from the date of his discharge, July 30, 1919, permanently and totally disabled within the meaning of the law.” (p. 209, lines 1-10.)

XXI.

The Court erred in charging and instructing the jury as follows:

“Plaintiff’s requested instruction No. 4.

“You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed

to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less [58] regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled." (p. 204, lines 6-23.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving of instruction No. 4, requested by the plaintiff in this case for the reason that the same relates to and covers matters not based upon any evidence appearing in the case. To illustrate the statement, 'He may have worked when really unable and at the risk of endangering his health or life,' is not based upon one word or syllable of testimony. There was not a word of testimony in the case properly before the court for consideration." (p. 209, lines 11-18.)

XXII.

The Court erred in charging and instructing the jury as follows:

“Plaintiff’s requested instruction No. 5.

You are instructed that in determining whether the said Carl F. Noble is totally disabled, you may take into consideration his previous occupation, learning and experience, in so far as it is shown from the evidence.” (p. 204, lines 24-27.)

Defendant’s objection to said instruction being as follows:

“Defendant objects to the giving of instruction No. 5 requested by the plaintiff in this case for the reason that it contains an incorrect statement of the law, and it is not based upon the testimony in this case, there being no evidence in the record of this case during the trial as to the learning of the plaintiff, Carl Noble, or of his experience, other than his experience in the occupation of a farmer.” (p. 209, lines 19-25.) [59]

XXIII.

The Court erred in charging and instructing the jury as follows:

“You are instructed that you are to consider the term ‘Total Disability’ as any impairment of mind or body which renders it impossible for the insured to follow a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it

reasonably certain that it will continue throughout the lifetime of the insured.

You are instructed that total disability does not mean helplessness or complete disability, but it includes more than that which is partial. Permanent disability means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of permanent total disability. He may have worked when really unable and at the risk of endangering his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically with frequent interruptions due to his disability, or if his periods of work are more or less regular and continuous, were done at the risk of endangering his health or life, he was then totally and permanently disabled within the meaning of his contract, and the War Risk Insurance Act; but on the other hand, if he was able to follow a gainful occupation regularly without frequent interruptions because of his disability, then he would not be totally and permanently disabled." (p. 203, line 29 to p. 204, line 23.)

Defendant's objection to said instruction being as follows:

"Defendant objects to the giving of the instruction with reference to total and permanent disability on the ground and for the reasons following:

That it does not contain a correct statement of the [60] principle of law; that it is involved, and may because of that involvement, mislead the jury; that it tends rather to confuse the mind rather than to enlighten the mind of the jury in arriving at their verdict, and that it wholly fails to include within its terms one of the essential elements laid down in *Lumbra* against the United States, in this, that it wholly omits a definition as given by that court as follows: 'But manifestly work performed may be such as conclusively to negative total and permanent disability at the earliest time.'—In this case the date of the discharge of the plaintiff from the army, July 30, 1919.'" (p. 209, line 26 to p. 210, line 9.)

XXIV.

The evidence is insufficient to justify the verdict.

XXV.

There is nothing in the evidence in this case tending to show that at the time the insurance upon which plaintiff bases his claim, lapsed, he was totally and permanently disabled.

XXVI.

The verdict is against law.

XXVII.

When measured by the rules of law as stated by the Court in its charge to the jury the evidence in this case does not justify and is insufficient to support the verdict rendered in this case.

XXVIII.

It affirmatively appears from the evidence that plaintiff was not permanently and totally disabled from following continuously a substantially gainful occupation at the time of his discharge from the army and subsequent thereto.

XXIX.

The evidence affirmatively discloses that the plaintiff was able to and did follow a substantially gainful occupation for some years after his discharge from the army at which he earned substantial sums of money. [61]

XXX.

The Court erred in refusing to enter judgment in favor of the defendant as requested by it at the close of the testimony, to which action of the Court defendant duly excepted.

XXXI.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

XXXII.

The Court was without jurisdiction to enter the judgment that it entered in this action.

WHEREFORE, for such errors defendant prays that the judgment of the District Court of the United States for the District of Montana, Great Falls Division, dated November 1, 1934, be set aside

and vacated and this case remanded for a new trial.

JAMES H. BALDWIN,

United States Attorney for
the District of Montana.

R. LEWIS BROWN,

Assistant United States
Attorney.

FRANCIS J. MCGAN,

Attorney,
Department of Justice.

(Attorneys for Defendant)

Service of the above and foregoing Assignment
of Errors admitted and copy thereof received at
Great Falls, Montana this 23 day of Jan., 1935.

MOLUMBY, BUSHIA & GREENAN,

By C. T. Busha, Jr.,

(Attorneys for Plaintiff)

[Endorsed]: Filed Jan. 23, 1935. [62]

Thereafter, on January 23, 1935, Petition for
Appeal was duly filed herein, in the words and
figures following, to-wit:

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendant, feeling itself ag-
grieved by the rulings of the Court during the trial
of the above-entitled action and the order and final

judgment entered therein on the 1st day of November, 1934, does hereby appeal from the said rulings of the Court and said order and judgment, and each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors presented herewith, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided.

JAMES H. BALDWIN,
United States Attorney for
the District of Montana,
Butte, Montana.

R. LEWIS BROWN,
Assistant United States
Attorney, District of Montana,
Butte, Montana.

FRANCIS J. McGAN,
Attorney,
Department of Justice,
Butte, Montana.

(Attorneys for Defendant and
Appellant) [64]

Service of the above and foregoing Petition for Appeal acknowledged and copy thereof received at

Great Falls, Montana this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,

Great Falls, Montana.

By C. T. Busha, Jr.,

(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [65]

Thereafter, on January 23, 1935, Order Allowing Appeal was duly filed herein, in the words and figures following, to-wit: [66]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant in the above-entitled action having filed therein its petition that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made, rendered and entered of record in the above-entitled Court and action on November 1, 1934, and that a citation be issued as provided by law and a transcript of the records, proceedings and papers upon which said order and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided and being fully advised of the law and the facts and it appearing therefrom to be a proper case therefor, Now Therefore:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit from the order and judgment heretofore entered and filed herein on the 1st day of November, 1934, as aforesaid, be and the same is hereby allowed; and,

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations, said order and judgment, and all proceedings in the above-entitled action be forthwith transmitted by the Clerk of the above-entitled Court to said United States Circuit Court of Appeals for the Ninth [67] Circuit.

Done in open Court at Great Falls, Montana, this 23rd day of January, 1935.

CHARLES N. PRAY,

Judge of the District Court
of the United States,
District of Montana.

Service of the above and foregoing Order acknowledged and copy thereof received at Great Falls, Montana this 23 day of January, 1935.

MOLUMBY, BUSH & GREENAN,
Great Falls, Montana.

By C. T. Busha, Jr.,
(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [68]

Thereafter, on January 23, 1935, Stipulation and Order for Diminution of Record was duly filed herein, in the words and figures following, to-wit: [69]

[Title of Court and Cause.]

STIPULATION FOR DIMINUTION
OF RECORD.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that in the printing of the transcript of the record therein the title of the Court and the title of the cause on the pleadings and documents need not be printed in full, but may be entitled thus,—“Title of Court and Cause,” and that the endorsement on each of such papers and documents, except the filing endorsement, may also be omitted.

Dated January 23, 1935.

JAMES H. BALDWIN,

United States Attorney for the
District of Montana,
Butte, Montana.

R. LEWIS BROWN,

Assistant United States Attorney
District of Montana,
Butte, Montana,

FRANCIS J. MCGAN,

Attorney, Department of Justice,
Butte, Montana.

(Attorneys for Defendant
and Appellant)

MOLUMBY, BUSHIA & GREENAN,
Great Falls, Montana.

By C. T. Busha, Jr.,

(Attorneys for Plaintiff and Appellee)

It is so ordered:

CHARLES N. PRAY,
Judge of the United States
District Court,
District of Montana.

[Endorsed]: Filed Jan. 23, 1935. [70]

Thereafter, on January 23, 1935, Citation, issued by the Judge on January 23, 1935, was duly filed herein, the original Citation being hereto annexed and in words and figures as follows, to-wit: [71]

[Title of Court and Cause.]

CITATION.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal in the above-entitled action of record in the office of the Clerk of the District Court of the United States for the District of Montana, Great Falls Division, wherein the United States of America is appellant and Carl F. Noble is appellee, to show cause, if any there be, why the judgment rendered and entered against the defendant and appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties hereto in that behalf.

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, this 23rd day of January, 1935.

CHARLES N. PRAY,
Judge of the District Court
of the United States,
District of Montana. [72]

Service of the above and foregoing Citation admitted and copy thereof received at Great Falls, Montana, this 23 day of January, 1935.

MOLUMBY, BUSHA & GREENAN,
By C. T. Busha, Jr.,
(Attorneys for Plaintiff and
Appellee)

[Endorsed]: Filed Jan. 23rd, 1935. [73]

Thereafter, on January 23, 1935, Praecipe for Transcript was duly filed herein, in the words and figures following, to-wit: [75]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the above-entitled Court:

Sir:

Please prepare and certify record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled action and include therein the following papers and documents:

1. Summons and Marshal's return endorsed thereon;
2. Complaint;
3. Answer;

4. Judgment;
5. Bill of Exceptions;
6. Assignment of Errors;
7. Petition for Appeal;
8. Order allowing appeal;
9. Stipulation and Order for Diminution of Record;
10. Citation;
11. Clerk's Certificate;
12. Stipulation of counsel granting defendant ninety days from date to prepare, serve and file its Bill of Exceptions;
13. Order of Judge granting defendant ninety days from date to prepare, serve and file its Bill of Exceptions;
14. Order of Judge extending the term until Defendant's Bill of Exceptions is finally settled; [76]
15. Defendant's requested instructions not given by the court; and
16. This Praeceptum.

Dated this day of January, 1935.

JAMES H. BALDWIN,

United States Attorney for the
District of Montana,
Butte, Montana.

R. LEWIS BROWN,

Assistant United States Attorney
District of Montana,
Butte, Montana.

FRANCIS J. MCGAN,

Attorney, Department of Justice,
Butte, Montana.

(Attorneys for Defendant
and Appellant)

Service of the above and foregoing Praeceptum acknowledged and copy thereof received at Great Falls, Montana, this 23 day of January, 1935.

MOLUMBY, BUSH & GREENAN,

By C. T. Busha, Jr.,

(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Jan. 23, 1935. [77]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes, consisting of 299 pages, numbered consecutively from 1 to 299 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 895, Carl F. Noble vs. United States of America, which have by praeceptum been designated to be incorporated into said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Fifty and 50/100 Dollars, (\$50.50), and have been made a charge against the United States.

WITNESS my hand and the seal of said court at Helena, Montana, this 15 day of Feb., A. D. 1935.

[Seal]

C. R. GARLOW, Clerk.

By....., Deputy. [300]

[Endorsed]: No. 7776. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Carl F. Noble, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 18, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.